TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 23,322

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOE HIGDON, DOING BUSINESS UNDER THE FIRM NAME OF CRESCENT COAL COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED AUGUST 6, 1913.

(23,323)

(23,343)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 748.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOE HODSON, DOING BUSINESS UNDER THE FIRM NAME OF CRESCENT COAL COMPANY

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from Henderson circuit court	1	1
Schedule	1	1
Petition	2	2
Exhibit—Letter, Powell to Crescent Coal Company, August 13, 1908	8	6
Order filing demurrer	9	6
Demurrer	9	6
Order overruling demurrer	9	6
Order filing general demurrer	9	6
General demurrer	9	7
Motion to require plaintiff to file tariff overruled	10	7
Defendant's demurrer overruled	10	7
Order filing answer	10	7
Answer	11	8
Order giving plaintiff until rule day to file answer	15	11
Defendant's motion to transfer to equity	16	11
Transferred to equity	16	11
Order continuing	16	11
Defendant given leave to retake deposition of R. W. Powell	16	11

JUDD & DETWEILER, (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1912.

	Original	Print
Order submitting	16	11
Trial and judgment	17	12
Bill of exceptions filed	17	12
Bill of exceptions	17	12
Statement of evidence introduced	17	12
Deposition of Joe Higdon	19	13
Exhibit No. 1—Agreement of May 14, 1908	64	41
No. 2—Contract of May 27, 1908	66a	43
No. 3—Letter, Higdon to Powell, July 2, 1908	67	44
No. 4—Letter, Powell to Higdon, July 3, 1908	67	44
No. 5—Letter, Higdon to Powell, July 1, 1908	68	44
No. 6—Letter, Powell to Higdon, July 13, 1908	69	45
No. 7—Letter, Higdon to Powell, July 7, 1908	69	46
No. 8—Letter, Powell to Keystone & Crescent Companies, July 16, 1908	70	46
No. 9—Letter to Powell, August 26, 1908	70	46
Agreement as to Exhibit No. 10	71	47
Exhibit No. 10—Tariff	72	47
No. 12—List of names of users of steam coal in Henderson, &c.	73	48
No. 13—Agreement of May 26, 1908	74	49
No. 14—Agreement of March 31, 1908	75	49
Deposition of L. A. Bosserman	76	50
R. W. Powell	90	58
C. B. Compton	93	61
Exhibit—Rates, rules, and regulations governing switching of cars, &c.	104	68
Deposition of R. W. Powell	113	77
Deposition of C. B. Compton	162	108
Exhibit No. 1—Bill for switching	192	128
No. 2—Bill for switching	193	128
No. 3—Letter, Keystone Company to Powell, July 1, 1908	193	128
No. 4—Letter to Powell, July 13, 1908	193	129
No. 5—Letter, Powell to Clay & Clay, July 16, 1908	195	130
Deposition of J. L. Nicholson	197	131
H. J. McAvoy	202	135
Henry Kraver	204	136
Paul J. Marrs	206	137
Wm. Elliott	208	138
L. A. Kuester	208	139
Sam. J. Alves	210	140
Henry Liveright	210	140
Joe Higdon	214	143
C. M. Bullitt	216	144
Statement of objections, &c.	221	147
Judge's certificate to bill of exceptions	222	147
Order filing schedule	222	148
Certificate of circuit clerk	223	148
Statement of parties' first appeal in court of appeals	224	148
Order for oral argument	225	149
Oral argument sustained	227	150

	Original.	Print
Order withdrawing brief to file printed copies	227	150
Argument and submission	227	150
Judgment	227	151
Opinion of court of appeals	227	151
Motion for time to file petition for rehearing	249	159
Motion to file petition sustained	249	160
Petition for modification and extension of opinion filed by appellant	250	160
Order filing petition for rehearing and modification by appellee	253	162
Petition for rehearing and modification of opinion	254	162
Order overruling petition for rehearing and modification of opinion filed by appellant and appellee	295	182
Schedule	296	182
Transcript of record on second appeal	296	183
Petition	297	183
Special demurrer	304	188
General demurrer	305	188
Case set for trial	305	188
Motion to rule plaintiff to file tariff overruled	306	189
Defendant's demurrer overruled	306	189
Answer	306	189
Plaintiff given until rule day to file reply	312	192
Motion to transfer case to equity	312	193
Case transferred to equity	312	193
Case continued	312	193
Defendant given leave to retake deposition of R. W. Powell	312	193
Case submitted	312	193
Order controverting allegation in defendant's answer	313	193
Judgment	313	193
Plaintiff files schedule	313	193
Case continued	314	194
Mandate of court of appeals filed	314	194
Case set for trial	314	194
Motion to file amended answer	315	194
Motion to file amended answer overruled	315	194
Amended answer	315	195
Seconded amended answer	320	198
Case continued	322	199
Case called for trial	322	199
Judgment	323	199
Motion for new trial	324	200
Motion for new trial overruled	324	200
Ordered that statement of switching be attached to transcript without copying	325	200
Bill of exceptions tendered	325	201
Bill of exceptions	326	201
Charge to the jury	326	202
Defendant's requests to charge	328	20
Verdict	329	20
Motion for new trial	329	203
Judge's certificate to bill of exceptions	330	204
Clerk's certificate	331	204

	Original	Print
Transcript of testimony and bill of exceptions	332	205
Deposition of Joe Higdon	333	205
C. M. Bullitt	337	208
Joe Higdon (recalled)	348	215
Ben Robinson	381	235
R. W. Powell	384	236
Deposition of Lee Robinson	390	240
—— Coyle	392	241
Joe Higdon (recalled)	395	243
L. A. Bosserman	401	247
Joe Higdon (recalled)	409	252
Plaintiff rests	412	253
Affidavit as to evidence of Judson A. Wilson	412	253
Deposition of R. A. Powell	412	254
L. P. Hite	415	255
M. M. Moser	416	257
Ben Robinson	418	258
C. B. Compton	419	258
Henry Liveright	448	277
Defendant rests	451	278
Deposition of Joe Higdon (recalled)	451	279
Certificate of the judge to transcript of evidence	454	280
Exhibit filed with deposition of R. W. Powell, switching charges	455	280
Statement of parties in court of appeals on second appeal	463	281
Order advancing and submitting case	464	281
Order filing supersedeas bond and supersedeas as part of the record	464	281
Bond and supersedeas	466	283
Judgment	467	284
Opinion of court of appeals	468	284
Assignment of errors	480	289
Petition for writ of error	484	290
Writ of error and order allowing same	487	292
Writ of error bond	490	293
Citation, with acceptance of service	493	294
Certificate of clerk of the court of appeals	494	295

a THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

Pleas Before the Honorable the Judges of the Court of Appeals of Kentucky, at the Capitol in the City of Frankfort, on the Twenty-first day of June, 1912.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOE HIGDON (Doing Business under the Name of Crescent Coal Company), Appellee.

Appeal from Henderson Circuit Court.

Be it remembered that heretofore, to-wit, on the 13th day of December, 1910 the appellee, Joe Higdon, doing business under the name of Crescent Coal Company, by his counsel, filed in the office of the Clerk of the Court of Appeals of Kentucky a transcript of record in words and figures following, to-wit:—

1 STATE OF KENTUCKY:

Henderson Circuit Court, September Term, 1910, October 27th, 1910.

Pleas Before Hon. J. V. Henson, Judge.

CRESCENT COAL CO., Plaintiff.
vs.
L. & N. R. R. Co., Defendant.

Transcript.

Be it remembered that on Oct. 28th, 1910, the plaintiff in the above styled case filed its schedule for the purpose of an appeal to the Court of Appeals. Said Schedule is here copied. Viz:

Henderson Circuit Court.

JOE HIGDON, Doing Business under Name of Crescent Coal Co., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

Schedule and Agreement.

For the purpose of an appeal herein the Clerk is directed to copy the entire record, except summons and exhibit No. 10 filed with the deposition of Joe Higdon, being Terminal Tariff of the Louisville

& Nashville Railroad Company; and exhibit filed with 2nd. deposition of R. W. Powell, being statement of switching done; but he will attach the original exhibits to the record to be taken to the Court of Appeals without copying.

This October 28th, 1910.

CLAY & CLAY,
Attorneys for Plaintiff.

The above schedule is sufficient, and notice of filing same is hereby waived. It it also agreed that the original Terminal Tariff of the Louisville & Nashville Railroad Co., being exhibit No. 10, filed with the deposition of Jo. Higdon and exhibit filed with 2nd., deposition of R. W. Powell, being statement of switching may be taken
2 up to the Court of Appeals as part of the record without being copied.

This October 28th., 1910.

YEAMAN & YEAMAN,
Attorneys for Defendant.

On August 27th, 1908, the plaintiff filed its original petition herein, which is here copied, Viz.:

Henderson Circuit Court.

Jo. Higdon, Doing Business under the Name of Crescent Coal Company, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Petition.

The plaintiff Jo. Higdon states that he is a resident of the City and County of Henderson and State of Kentucky, and is engaged in the business of buying and selling coal in the city of Henderson, Ky., under the name of the Crescent Coal Company. That the defendant the Louisville & Nasnville Railroad Company is a corporation, created, organized and doing business under the laws of the State of Kentucky, is a common carrier of freight and passengers, and has a line of railroad running through the City of Henderson, Henderson County, Kentucky. In and around the City of Henderson, and within what are known as the switching limits of the City of Henderson, the said defendant has constructed a large number of switches and spur tracts, leading from its main line of road, to the various industrial plants of the City of Henderson, which were constructed, and are used for the purpose of transporting and delivering freight from and to said industrial plants, and are operated by the defendant as a part of its line of railroad.

The said defendant, the Louisville & Nashville Railroad
3 Co., has issued and promulgated its tariff rates for switching charges in Henderson, Ky., terminals, which went into effect March, 20th., 1908, and another tariff which went into effect May

4th., 1908, by both of which the said defendant fixed and established a charge of $2.00 per car for car rental, and $2.00 per car switching charges where it furnished cars and transported same from one industrial plant to another, and since said tariffs were promulgated and for a long while prior thereto, the said defendant did, and does now transport and switch freight in car load lots, from one switch or one industry to another, within the switching limits of the City of Henderson, Ky., at the charged named in its tariff of rates of $2.00 per car, for rental of the car, and $2.00 per car for switching the same, and has and does perform such services for other coal dealers in the City of Henderson, and particularly for the St. Bernard Mining Co., and its local representatives, and for dealers in other commodities in the City of Henderson, Ky., at said price. It also furnishes cars, and switches the same from one industry to another, within switching limits, at other points in the State of Kentucky, and in other cities and places in other states along its line, where it has physical connection with industries located thereon, at rates of from $2.00 to $5.00 per car, depending on the distance, for the whole service; and in no case where such charges are made, is the distance any less than the distances to the industrial plants within the switching limits of the City of Henderson, Ky.

The plaintiff states that the Keystone Mining & Manufacturing Co., is engaged in the operation of a coal mine in and near the City of Henderson, Ky., and within the terminal or switching limits of said City; that the mine of said company is equipped with a switch leading from its mine to the tracks of the defendant Company, and said switch is controlled and operated by the defendant Company, and is physically connected with the right of way and tracks of the defendant. All of the industrial plants hereinafter referred to
4 are also approached by a switch or switches, controlled and operated by the defendant, and which are physically connected with the tracks and right of way of the defendant. Now the plaintiff states that relying upon the duty and obligation, which he alleges rested upon the defendant to furnish him cars and to switch same, at a reasonable rate, and at the rate charged other shippers and buyers, he entered into a contract or contracts with the said Keystone Mining & Manufacturing Company, effective July 1st., 1908, by the terms of which he agreed to purchase from said Company, and said company agreed to sell and deliver him, during the year beginning July 1st, 1908, twenty thousand tons of coal at an agreed price or agreed prices, to be delivered F. O. B. cars on the defendant's track or switch, at the mine of said company, and further made a contract with said Keystone Mining & Manufacturing Co., by the terms of which the plaintiff was made sales agent, beginning July 1st., 1908, and was given the refusal of the entire output of said Keystone Mining & Manufacturing Co., over and above what was necessary for its own use in supplying its wagon trade, or retail customers, and what was necessary to fill said contract for said 20,000 tons above mentioned. The plaintiff had sold by contract to various industrial plants in the city of Henderson, and within said switching limits and having physical connection with the defendant's road and tracks,

practically the whole of said 20,000 tons of coal purchased outright, all to be delivered to said plants in car load lots, F. O. B. their respective plants, and all of said industrial concerns were able and ready to take said coal as delivered at the prices agreed upon. Plaintiff states that he could have also sold in his regular trade an amount in excess of said 20,000 tons, and could and would have sold 10,000 tons or more of coal under the second contract with the said Keystone Mining & Manufacuring Co., mentioned above. He states that the defendant knew of the contracts made with said Keystone Mining & Manufacturing Co., and was notified thereof, and it knew and was notified that plaintiff could not obtain said coal
5 from said company, and could not furnish the said coal to his customers, except at very great loss, unless it the defendant, would furnish the cars in which to load the same at said mines, and would switch the same from said mine to the various industries on its line, and with which it had physical connection, to which plaintiff had or might sell and contract the same. After the same contracts above mentioned had been made, and beginning July 1st., 1908, it commenced ordering from the defendant cars in which to have said coal loaded placed at the Keystone Mining & Manufacuring Co., plant, and agreed to pay and offered to pay in the regular course of its dealing with the defendant, the amount of its tariff rates for said cars and for switching same, and offered and agreed to pay it a reasonable rate for its said services. The Keystone Mining & Manufacturing Co. likewise ordered said cars placed and notified the defendant to place the same at this plaintiff's orders. For a long while and up to the 13th day of July, 1908, the defendant refused to furnish said cars or to perform said switching service at all. On the 13th. day of July it notified the plaintiff and said Keystone Mining & Manufacturing Co., that it was ready and willing to furnish said cars and perform said service at the rate of fifty cents per ton. Now plaintiff alleges that the coal cars in use by the defendant will hold, on an average, 80,000 lbs. or 40 tons of coal per car, and at the rate of 50 c. per ton, each car furnished and switched by the defendant would have cost this plaintiff on an average of $20.00 per car, instead of $4.00 per car, the amount charged by it to other shippers and dealers, and he states that the said rate of 50 c. per ton, was an-is unreasonable and exhorbitant. Between the 1st day of July 1908, and the 13th, day of July 1908, it ordered from the defendant a large number of cars to be placed at said mine, there to be loaded with
coal and switched as aforesaid, as did likewise the Keystone
6 Mining & Manufacturing Co., on its account, but the defendant failed and refused to furnish said cars. Between the 13th day of July 1908 and the 13th day of August 1908, the plaintiff, as well as said Keystone Mining & Manufacuring Co. for and on his account, ordered a large number of cars placed at said mine to be loaded with coal by said Mining Co. and switched as aforesaid by the defendant, but the defendant refused to furnish said cars or to perform said switching service, unless the plaintiff would agree to pay said excessive and ex*hor*bitant rate of 50 c. *cents* per ton, which he refused to pay. On the 13th day of August, 1908, the defendant notified this

plaintiff, as well as said Keystone Mining & Manufacturing Co., that it would not furnish cars to be loaded with coal at the mine of said Keystone Mining & Manufacturing Co., for switching to plants on its road within the switching limits, and would not switch the same when loaded from said Keystone Mining & Manufacuring Co. to plants on its road within the switching limits, at all or at any price. Said notice was given in the form of a letter from the defendant through its agent R. W. Powell, and the one received by this plaintiff is filed herewith as part thereof, marked A. By the refusal of the defendant to furnish said cars at the plant of the Keystone Mining & Manufacturing Co., and by its refusal to switch the same from there to various industrial plants in the City of Henderson, on its line, with which it had physical connection, and with which the plaintiff was doing business, the defendant has rendered this plaintiff's contracts with the said Keystone Mining & Manufacuring Co., and each of them, a nudum pactum, and has made it impossible for the plaintiff to obtain the coal necessary to be handled by him to fill his contracts and to carry on his business, except at greatly increased prices.

He states that if the defendant had furnished said cars, and
7 switched the same as above stated, he could and would have paid the same, and offered to pay the same, and could and would have paid to said Keystone Mining & Manufacuring Co. the contract price for said coal, and he could and would have sold, and actually had sold or arranged to sell, at least 30,000 tons of coal per year, at a price which would have netted to this plaintiff a profit of forty-cents per ton after payment of original cost price, freight and all expenses, the whole of which he has lost by reason of the refusal of the defendant to perform said service as aforesaid. The plaintiff states that to obtain the coal necessary for him to use in filling his contracts, and to carry on his business, he would have to pay therefor, delivered in Henderson, a much larger price than that agreed to be paid to said Keystone Mining & Manufacturing Co., and the difference in price plus freight from other points, would be in excess of the profit he would or could make on same; and if plaintiff is compelled to go on the open market and obtain said coal elsewhere, instead of making a profit thereon, he would have to deliver same to his customers at a loss. The plaintiff states that the contracts aforesaid, made with the Keystone Mining & Manufacuring Co., run from the 1st of July 1908 to the 1st day of July, 1909, with the privilege given this plaintiff to renew the same for another year on the same terms. He states that his profits under said contracts, and on said coal for the first year would have amounted to the sum of $12,000.00, and for the second year to the sum of $12,000.00, over and above cost, freight, and expenses, for each year. The plaintiff further states that the rate of $4.00 per car, contained in defendant's tariff of rates, that is to say, $2.00 per car for rental of the car, and $2.00 per car for switching same, while higher than the rate charged by the defendant at other places and under similar conditions, is a
reasonable rate, all things considered, and the plaintiff was
8 ready and willing, and is now ready and willing to pay the same. The action of the defendant in refusing to furnish

cars and handle said coal at all, is high handed and arbitrary, and is an unjust discrimination against this plaintiff, against the locality in which he does business, and against the commodity and description of freight in which he deals, and gives to other persons, localities, and descriptions of traffic an undue and unreasonable preference or advantage. Plaintiff states that by reason of the action of the defendant, as herein set forth, he has been damaged in the sum of Twenty four Thousand ($24,000.00) dollars, and is also entitled to recover of the defendant reasonable attorney's fees herein.

Wherefore the plaintiff prays judgment against the defendant for the sum of Twenty-four thousand ($24,000.00) dollars, damages; he prays judgment for reasonable attorneys' fees to be fixed by the Court, and he prays for his costs herein and for all proper relief.

CLAY & CLAY,
Attorneys for Plaintiff.

The exhibit referred to in the foregoing petition is here copied, viz:

Louisville & Nashville Railroad Company.

HENDERSON, KY., *Aug.* 13, 1908.

In reply refer to 1113.

Crescent Coal Co., City.

GENTLEMEN: Handling Coal within Yard Limits at Henderson. Please refer to my letter of July 16th, advising that we would furnish the Keystone Mining & Manufacturing Company with empty cars for loading coal to be switched to the various commer-
9 cial industries within Henderson Yard limits, and perform the service for a charge of 50 cents per ton. I am now in receipt of instructions to the effect that we will not undertake to handle this coal at all. This for your information.

Yours truly,

R. W. POWELL, *Agent.*

On September 8th, 1908, being the 2nd day of the September 1908 term of Court, the following order was entered herein. Viz: Came the defendant by attorney, and filed a special demurrer to the Jurisdiction of this Court.

The demurrer referred to above is here copied, Viz:

Defendant demurs specially to the petition of plaintiff herein because this Court has no jurisdiction of the subject of the action.

YEAMAN & YEAMAN,
Att'ys for Defendant.

On October 6th, 1908, being the 26th day of the September term, 1908, the following order was entered herein, Viz:

Coming on to be heard on the defendant's special demurrer heretofore filed herein, and the Court being advised overruled the

same, to which ruling of the Court the defendant objects and excepts. Thereupon the defendant by attorney filed a general demurrer to plaintiff's petition.

The general demurrer referred to in the foregoing order is here copied, Viz:

The defendant demurs generally to plaintiff's petition because it does not state facts sufficient to constitute any cause of action against this defendant, and hereof it prays the judgment of this Court.

LOUISVILLE & NASHVILLE R'D CO.,
By YEAMAN & YEAMAN, *Att'ys.*

On January 4th, 1909, being the 1st day of the January 1909 term the following order was entered herein, Viz:
Ordered that the two foregoing cases be set for trial on the 33rd day of the term.

On May the 3rd, 1909, being the 1st day of the May 1909 term of Court the following order was entered herein, Viz:
Ordered that this case be set for trial on the 17th day of the term.

On Sept. 8th, 1909, being the 3 day of the September term, the following order was entered herein, Viz:
Ordered by the Court that this case be set for trial on the 25 day of the present term of Court.

On September 28th, 1909, being the 20th day of the September 1909 term of Court, the following order was entered herein, Viz:
Came defendant by attorney and moved the court to rule the plaintiff to file tariff referred to in plaintiff's petition as having been promulgated March 20, 1908, and one promulgated May 4th, 1909. The Court being advised overruled said motion to which ruling of Court the defendant objects and excepts.

On October 7th, 1909, being the 28th day of the September 1909 term of Court, the following order was entered herein, Viz:
Coming on to be heard on defendant's demurrer to plaintiff's petition and the Court being advised overrules same to which ruling of Court the defendant objects and excepts.

On October 11th, 1909, being the 31st day of the September 1910 term of Court the following order was entered herein, Viz:
Came the defendant by attorney and filed its answer herein.

11 The answer referred to above is here copied, Viz:

Henderson Circuit Court.

Jo. HIGDON, Doing Business under the Name of Crescent Coal Company, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Answer.

The defendant, the Louisville & Nashville Railroad Company, for its answer to plaintiff's petition, denies that any of the switches, or spur tracks in the City of Henderson leading from its main line of road to the various industrial plants, or any of the industrial plants of said City, were constructed by the defendant, except under contract with and for the said industrial plants' own use and control and it says they have always owned and controlled said switches and spur tracks, and it denies that any of said switches or spur tracks are operated by the defendant as a part of its line of railroad.

The defendant denies that it has issued or promulgated any tariff of rates for switching charges in the Henderson Kentucky terminals, or that any such tariff went into effect March 20, 1908, or May 4, 1908, or at any time, or that by any such tariff, or any tariff it fixed or established a charge of $2 or any sum per car for car rental, or $2 per car, or any sum per car for switching charge, or that it has fixed or published or promulgated any tariff or schedule, or rate of charges for car rental or car rental for switching or transporting cars or freight from one industrial plant to another within the City of Henderson, except as hereinafter stated, and set forth in this answer. It denies that since March 20th, 1908, or May 4, 1908, or at all, it has or does, except as hereinafter stated, transport or switch freight from one switch or one industry to another within the limits of the City of Henderson at a charge of $2, or any sum per car for car rental, or $2, or any sum for switching, or that it has or does perform such service for other,

12 or any coal dealers in the City of Henderson, or for dealers in other commodities in said City, or at other points in the State of Kentucky, or in other Cities or places in other States along its line.

The defendant denies that any switch leading from the Keystone Mining & Manufacturing Company's mine or property to the tracts of the defendant is or has been controlled or operated by the defendant, or that the defendant controls, or operates the switch of any industrial plant in the City of Henderson.

Defendant denies that it is or was under a duty or obligation to switch or transport the coal or other property of the plaintiff, or of the Keystone Mining & Manufacturing Company, or other person from one switch or point within the City of Henderson to another point or switch within the said city, or to furnish cars with which to do such switching, and it denies that the plaintiff in reli-

ance upon any such duty or obligation entered into any contract with the Keystone Mining & Manufacturing Company, or other person, to purchase from said Company 20,000 tons or any quantity of Coal to be delivered on defendant's track or elsewhere, or that the plaintiff was given the refusal of the entire or any of the output of said Keystone Mining & Manufacturing Company in excess of said 20,000 tons and what was necessary to supply its own wagon trade or otherwise. Defendant denies that the plaintiff had sold the whole or any part of said 20,000 tons of said coal to industrial plants of the City of Henderson having physical connection with this defendant's road or tracks, and it has no knowledge or information sufficient to form a belief that said industrial concerns, or any of them were ready to take said coal, or any part thereof as delivered to them, nor that the plaintiff could have sold in his regular trade, or otherwise any amount in excess of said 20,000 tons, nor that he could or would have sold 10,000 tons, or any quantity of coal under any contract with said Keystone Mining & Manufacturing
13 Company. Defendant denies that it knew of any contract made by plaintiff with said Keystone Mining & Manufacturing Company, or that it was notified thereof, or that it knew, or was notified that the plaintiff could not obtain said coal from said company, or that it could not furnish said coal to his customers, except that the defendant would furnish cars in which to load said coal at the mines of the Keystone Mining & Manufacturing Company and switch the same when loaded, to the said industries in the City of Henderson. It denies that beginning with July 1st, 1908 or at any other time the plaintiff has ever agreed or offered to pay the defendant the amount of its tariff rates for said cars or any of them or for switching same. It denies that it charges or has ever charged shippers other than the plaintiff $4.00 per car or any sum for switching coal from one industrial plant within the City of Henderson to another such plant within said City, or that it does or has ever engaged in such switching. It denies that between July 1st, 1908 and July 13, 1908, or between July 18th, 1908, and August 13, 1908, or at any time plaintiff ordered a large number, or any number of cars to be placed at said mine to be loaded with coal and switched. Defendant denies that its refusal to furnish cars to be loaded at said Mining Company's mine, or its refusal to switch same from there to the industrial plants within the City of Henderson, has made it impossible for the plaintiff to obtain coal necessary to fill any contract, or carry on his business, or has in any manner made any contract of his void, or in any manner affected any contract.

Defendant has no knowledge or information sufficient to form a belief that if it had furnished cars on the switch of the said Keystone Mining & Manufacturing Company and had switched said cars when loaded, the plaintiff could or would have paid said company the contract price for said coal, nor that he could or would have sold, nor that he had sold or arranged to sell 30,000 tons, or any quantity of coal per year at a price that would have netted him

a profit of forty cents or any sum per ton, and it denies that
14 he has lost any profit by reason of the refusal of defendant to furnish cars on the switch of said Keystone Mining & Manufacturing Company, or to switch the same to other points within the City of Henderson, not by any act of defendant. It has no knowledge or information sufficient to form a belief that the plaintiff in order to obtain the coal necessary for him to fill any contract he had made, or to carry on his business would have to pay a larger price than that agreed to be paid to said Keystone Mining & Manufacturing Company, nor that the difference in price, with freight added from other points, would be in excess of the profit he could or would make on same, nor that he would have to deliver same to customers at a loss. The defendant has no knowledge or information sufficient to form a belief that the plaintiff made or had any contract with the Keystone Mining & Manufacturing Company for the purchase of any coal, nor that any such contract run from July 1, 1908 to July 1, 1909, nor that the plaintiff had the privilege to renew any contract for another year on the same, or any terms, nor that his profits under any contract for the first year, or second, or any year, would have been $12,000, or any sum, and it denies that any act of it was either high-handed or arbitrary, or was an unjust discrimination, or any discrimination against plaintiff or against the locality in which he does business, or against any commodity in which he deals, or gave to any other person, locality or description of traffic any preference or advantage, and it denies that the plaintiff has been damaged in any sum by any act of this defendant.

II.

The defendant admits that it is a Railroad Corporation, and is a common carrier of freight and passengers, that it is engaged in the business of operating a railroad between Henderson, Kentucky, and many other points within and without the State of Kentucky, but it says that it does not and never has engaged in the transportation
15 of freight or passengers, except as between stopping places or stations on its line of railroad, and it has never engaged in the business of, nor has it ever held itself out as engaged in the business of furnishing cars to be switched from one point within the City of Henderson, Kentucky, to any other point within said City, nor from one point within any City or stopping place, or station to any other point within the same stopping place or station, and it alleges and submits that its business and duty as such common carrier does not require, and would not permit of its engaging in such intraurban business. The defendant says that in order that it might be understood by all persons having business with it in the said City of Henderson and by the public generally of said City, that it did not engage in furnishing cars to be switched, nor in switching cars between different points within the same City or station, it had printed and published its rates, rules, and regulations governing the switching of cars, wherein it was plainly and distinctly set forth and stated as follows:—

"The L. & N. R. R. Co., does not engage in the business of local

switching between switches, tracks, warehouses or industries in the Henderson, Ky., Terminals, but where any such service is performed as an accommodation a charge of $2 per car plus $2 per car for car rental shall be assessed."

which statement was so printed and published long before the time that the plaintiff claims to have made any contract with the Keystone Mining & Manufacturing Company, and long before he made any contract with said company, and it avers that at the time he made the alleged contract with said company, (If any such contract was ever made, which defendant does not admit) he was informed of, and had full notice and knowledge of the said rule and regulation above copied and set forth. Defendant prays to be dismissed with its costs and for all proper relief.

YEAMAN & YEAMAN.
Attorneys for Defendant.

On Friday, Oct. 15, 1909, being the 35th day of the September 1909 term of Court the following order was entered herein, viz:—

Ordered that the plaintiff be and is given until the November Rule Day in which to file its reply and this case is continued generally to the next January term.

On Thursday, October 28th, 1909, being the 46 day of the September 1909 term of Court, the following order was entered herein. Viz:—

Came the defendant by attorney and moves the Court to transfer this case to the Equity side of the docket, ordered that said motion be and it is continued for the present.

On Friday, October 29th, 1909, being the 47th day of the September 1909 term of Court, the following order was entered herein, viz:—

Coming on to be heard on defendant's motion to transfer this cause to the Equity side of the docket and the Court considering same, orders the cause transferred and docketed in Equity which is now done. To this ruling of the Court the plaintiff objects and excepts.

On Thursday, February 22nd, 1910, being 44th day of the January 1910 term of Court, the following order was entered herein, viz:—

By agreement of parties, it is ordered that this case be continued.

On May 5th, being the 4th day of the May 1910 term of Court the following order was entered herein, viz:—

By agreement of parties, it is ordered that the defendant be given leave to retake the deposition of R. W. Powell.

On Friday, October 14th, being the 35th day of the September 1910 term of Court the following order was entered herein, viz:—

On motion of plaintiff by attorney, this case is submitted to the Court for trial.

17 On Saturday, October 22, 1910, being the 42nd day of the September 1910 term of Court, the following order was entered herein, viz:—

By agreement of parties, all af-irmative allegations in defendant's answer herein are taken as controverted of record.

On October 27th, being the 46th day of the September 1910 term of Court the following order was entered herein, viz:—

This cause coming on to be heard upon the whole record, and the Court having heard the argument, and being sufficiently advised, it is now ordered and adjudged that the plaintiff, Joe Higdon, recover nothing, that his petition be and it is dismissed absolutely, and that the defendant, The Louisville & Nashville Railroad Company recover of Joe Higdon, doing business as and in the name of the Crescent Coal Company, its costs herein expended, for which execution may issue. The plaintiff objects and excepts to the whole of this judgment, and prays an appeal to Court of Appeals, which is granted. Then came the plaintiff and tendered its Bill of Exceptions, and moved the Court to sign and file same, and make it a part of the record, which is done, and said Bill of Exceptions is now signed and filed and made a part of the record.

The Bill of Exceptions referred to above is here copied, viz:—

Be it remembered:—

That on the trial of this case, the following depositions were read on behalf of the plaintiff:—

1st. The deposition of Jo- Higdon, and the exhibits, Nos. 1 to 14, except No. 11, filed therewith, and also read the following exhibit filed with the petition.

2nd. The deposition of L.. A. Bosserman.

3rd. The deposition of R. W. Powell, taken by the de-

18 fendant on the 7th day of May, 1910, and the exhibit filed therewith and made a part thereof, being a "Statement of Local switching at Henderson, Ky., from Jany. 1st, 1906, to April 30th, 1910, inclusive.

The Defendant then read the following depositions:—

1st. The 1st deposition of C. B. Compton, filed Jany. 18th, 1910.
2nd. The deposition of R. W. Powell, filed April 30th, 1910.
3rd. The deposition of C. B. Compton, filed April 30th, 1910.
4th. The deposition of J. L. Nicholson.
5th. The deposition of H. J. McAvoy.
6th. The deposition of Henry Kraver.
7th. The deposition of Paul J. Marrs.
8th. The deposition of Wm. Elliott.
9th. The deposition of L. A. Kuester.
10th. The deposition of Sam. J. Alves.
11th. The deposition of Henry Liveright.

The plaintiff then read in rebuttal the following depositions:—

1st. The deposition of Jo Higdon, filed October 21st, 1910.
2nd. The deposition of C. M. Bullitt, and this was all the evidence heard upon the trial of this case.

The depositions above mentioned are all on file and are referred

to and made a part hereof. Said depositions and exhibits are as follows:—

(The Clerk will here copy all the above depositions and exhibits in the order above given; but he will only copy them once, where they are referred to or called for in any other part of the record he will refer to the page where they appear only; provided, that the Clerk will not copy exhibit J. H. No. 10, being "Terminal Tariff of the Louisville & Nashville Railroad Co., filed with the deposition of Jo Higdon, it having been agreed that the original Book or Tariff may be taken up without being copied.)

19 The Deposition of Joe Higdon is here copied, viz:—

The deposition of Joe Higdon, taken by agreement at the law office of Clay & Clay on the 12th day of January, 1910, to be read as evidence on behalf of the plaintiff on the trial of the case, now pending in the Henderson Circuit Court, wherein Joe Higdon doing business under the name of Crescent Coal Co., is plaintiff and the Louisville & Nashville Railroad Co. is defendant.

Direct examination by Mr. JAS. W. CLAY, attorney for plaintiff:

1 Q. Please state your name, age, residence and occupation?

A. My name is Joe Higdon. Residence—Henderson, Ky. My occupation is that of Superintendent of the Henderson Elevator Co. Age forty-one.

2. Q. Are you engaged in any other business beside that of being superintendent of the Henderson Elevator Co.?

A. I am engaged in the coal business. I do a coal business in the name of the Crescent Coal Co.

3 Q. Are you the same Joe Higdon who is plaintiff in this suit?

A. Yes, sir.

4 Q. Who composes the firm of Crescent Coal Co.?

A. There is no one interested but myself.

5 Q. How long have you been engaged in the coal business in the City of Henderson?

A. I think the coal business was opened in November, 1907.

6 Q. I will get you to state whether the Crescent Coal Co. made any contract with the Keystone Mining & Manufacturing Co. for its supply of Coal?

A. The Crescent Coal Co. did in July 1908, make a contract with the Keystone Mining & Manufacturing Co. for a supply of coal.

7 —. Was that contract, or were those contracts, verbal or in writing?

A. They were written contracts.

8 Q. Have you those contracts with you?

20 A. Yes sir.

9 Q. You have handed me a paper addressed to Messrs. Clay & Clay, Agents and Attorneys, Henderson, Ky., in the form of a proposition by the Keystone Mining & Manufacturing Co. under date of April 5, 1908, and accepted by the Crescent Coal Co. under date May 14, 1908, and signed by C. M. Bullitt as surety for the Crescent Coal Co. I will get you to state what that paper is?

A. That is a contract between the Crescent Coal Co. and the Keystone Mining & Manufacturing Co. that they shall furnish the Crescent Coal Co. coal for the period between the dates, I believe, beginning July 1, 1908, and ending July 1, 1909, in any quantities that may be demanded up to two thousand tons a month.

10 Q. I will get you to file that contract with the examiner, marked with your initials, and make it a part of your deposition.

A. I have marked it with my initials, and herewith file the same as part of my deposition.

11 Q. I hand you another paper under date the 27th day of May, 1908, signed by the Keystone Mining and Manufacturing Co. and by yourself. Please state what that paper is?

A. This paper is a contract between the Keystone Mining and Manufacturing Co. and Joe Higdon, myself, whereby it appoints me as its sales agent for the city of Henderson, which contract gives me the sole right to take orders for any coal they may mine beyond the amount it is necessary that they should have to fill their contract with the Crescent Coal Co. and supply their local trade delivered by wagons.

12 Q. Will you please file that contract with the examiner, marked J. H. #2, and make it a part of your deposition?

A. I have marked the paper as requested, and herewith file the same.

13 Q. Who was L. A. Bosserman, the man who signed the contract just filed?

A. He was general manager and treasurer of the Key-
21 stone Mining and Manufacturing Co. at Henderson.

14 Q. State whether or not he was the person in charge of the plant, and the person who had control of the business of the Company at the time?

A. Mr. Bosserman was in charge of the plant, and had control of their business, and signed each of those contracts.

15 Q. How long prior to the making of those contracts had you been engaged in the coal business in Henderson.

A. Nearly two years.

16 Q. During the two years' time what kind of a trade had you built up in that business?

A. The first period of my business was in domestic coal only. Afterwards I entered the wholesale business, or rather made an attempt to secure the steam business which is delivered in car load lots.

17 Q. At the time of making the first contract you have just filed with the Keystone Mining and Manufacturing Co. did you have any contracts for furnishing coal in car load lots in the city of Henderson with any consumer?

A. At the time prior to making that contract I had an option on this said contract with the Keystone Mining and Manufacturing Co. for thirty days, I believe, I don't remember the date, as to whether I should accept the contract. At the time I received the option I did have the contract with the city of Henderson to furnish steam coal for the Electric Light Plant, and also the water works.

After I secured the option on this contract I secured other contracts to a total of over seventeen thousand tons for the year.

18 Q. This contract with the Keystone Mining and Manufacturing Co. was for furnishing twenty thousand tons, I believe?

A. Yes, twenty thousand tons annually.

19 Q. Including the contracts you had before and the
22 contracts you made afterward, that is after the date of the contract with the Keystone Mining and Manufacturing Co., you had altogether contracts aggregating some seventeen thousand tons?

A. Yes, sir.

20 Q. State whether or not you filled the contracts you made for furnishing and delivering coal during that period?

A. I did fill them all.

21 Q. Where did you get the coal with which to fill those contracts?

A. I bought it from points on the L. & N. Road in Hopkins County, the most of it.

22 Q. Who paid the freight on the coal that you procured to fill these various contracts?

A. The Crescent Coal Co.

23 Q. Do you know what rate of freight the Crescent Coal Co. paid on those shipments?

A. Fifty cents a ton.

24 Q. Do you know what the custom, or practice in the City of Henderson is, or was, on the party of the L. & N. Railroad Co. at the time this contract with the Keystone Mining and Manufacturing Co. was made with reference to shipment of car load lots from one industry to another in the City of Henderson and furnishing cars for that purpose?

A. At the time this contract was made the custom was that they charged the sum of $2.00 per car for shipping from industry to industry. After the date of this contract the new tariff was made wherein they charged $2.00 for the car and $2.00 for the switching service. A charge of $4.00 per car, which is divided equally for switching service and car rental is the custom and practice now at this date for switching commodities other than coal from industry to industry, located on their line.

25 Q. What is the capacity in tons of the ordinary coal car?

A. Forty tons.

26 Q. At $4.00 per car what would be the rate per ton
23 for shipments of coal from the Keystone Mining Co. to the various industries in the city?

A. It would be ten cents per ton.

27 Q. I will get you to state whether or not either before or after making the contract with the Crescent Coal Co. the defendant, the Louisville and Nashville Railroad Co., furnished the Crescent Coal Co. with a car, or any cars, for shipping coal from the Keystone Mining Co. to any industry in the City of Henderson?

A. Before I made this contract I bought a car of coal from the Keystone Mining & Manufacturing Co. to be delivered to the Elec-

tric Light Works, the Louisville & Nashville Railroad Co. did furnish an empty, and switched the car from the Keystone Mine to the Electric Light Works, and charged me $2.00 for the service.

28 Q. After the contract as made with the Keystone Mining & Manufacturing Co. state whether or not they furnished you any cars for shipment from the Keystone Mining & Manufacturing Co. to any industry in the city?

A. They did not, they refused to furnish them other than to switch cars that the I. C. furnished. They did switch cars from the Illinois Central connections to the Keystone Mine, and they were there loaded and switched back to the I. C. for the account of the Crescent Coal Co., and charged $2.00 per car for that service.

29 Q. You are familiar with the location of the plant of the Keystone Mining & Manufacturing Co.?

A. Yes, sir.

30 Q. Upon which railroad is that plant located?

A. On the tracks of the L. & N.

31 Q. Do you know whether or not it is equipped with switches connected with the main track of the defendant?

A. Yes, sir, they have at least two switches and possibly more connected with the main line of the L. & N.

32 Q. Do you know where the switching limits of the City of Henderson are, or what they are, either from your own
24 knowledge, or from what the agent of the railroad company has told you?

A. I do not know the outside limits, but I do know that the Keystone Mine is within the switching limits as it would be defined by the custom of the railroad in switching cars to other industries, as they pass near the Keystone Mines in going beyond around the Belt Line to industries on the belt.

33 Q. After the first day of July, the date your contract with the Crescent Coal Co. went into effect, I will get you to state whether or not you gave any instructions to the defendant, the Louisville & Nashville Railroad Co., about the placing of cars for the purpose of having the same loaded with *caol* at the Keystone Mining & Manufacturing Co., and having the same switched to any of the industries in the City of Henderson?

A. Beginning with the first of July we ordered cars daily by 'phone, quite frequently confirming the order by letter, and they refused to place any cars whatever to be handled on the then switching tariff that governed switching in Henderson.

34 Q. I hand you a copy of a letter dated July 2, 1908, addressed R. W. Powell, Agent, I will get you to examine that letter and state what it is?

A. This is a confirmation of a telephone order for two empty cars of coal to be placed at the Keystone Mining & Manufacturing Co.'s plant to be loaded with coal, one of them ordered to be switched to the Electric Light Plant, and the other to A. Waller & Co. under the tariff which now governs switching charges in Henderson.

35 Q. What was done with the letter of which the letter just mentioned by you is a copy?

A. It was mailed to R. W. Powell, Agent of Louisville & Nashville Railroad Co.

36 Q. Who has the original of that letter now so far as you know?

A. I presume Mr. Powell has it.

25 37 Q. Is the paper you have just examined a copy of that letter?

A. Yes, sir.

38 Q. Will you please file that copy of the letter with the examiner marked J. H. #3 for identification, and make it a part of your deposition?

A. I file the paper marked as requested.

39 Q. I also hand what purports to be a copy of a letter written by you to R. W. Powell, Agent, dated July 1, 1908. I will get you to examine that paper and state what it is?

A. This letter is a confirmation of a telephone communication wherein I ordered for the Crescent Coal Co. two empty cars to be placed on the Keystone Mine switch, one to be switched to the Henderson Elevator Co. and the other to A. Waller & Co. under the tariff governing switching charges in Henderson at that time.

40 Q. What was done with the original of which that is a copy?

A. It was mailed to R. W. Powell, Agent of the Louisville & Nashville Railroad Co., at Henderson, Ky.

41 Q. Is the paper you have a copy of the letter you sent to R. W. Powell, Agent?

A. Yes, sir, this is a carbon copy.

42 Q. Previous to sending the two letters just mentioned, state whether or not you had ordered by telephone the placing of the four cars mentioned?

A. Yes, sir.

43 Q. State whether or not the L. & N. Railroad Co. complied with your request for placing those four cars.

A. They did not.

44 Q. Did they give any reason for not complying with your request, or write you anything with reference thereto?

A. In talking over the telephone he gave the reason that

26 he had not the authority to handle the coal under the switching tariff, but had asked for specific instructions, and in the meantime would not furnish any cars.

45 Q. I hand you a letter dated July 3, 1908, written on the letter head of the Louisville & Nashville Railroad Co., purporting to be signed by R. W. Powell, Agent, and addressed to the Crescent Coal Co. Please examine that letter and state what it is.

A. This is a letter from R. W. Powell, agent of the L. & N. Railroad Co. wherein he declines to undertake to furnish cars for switching coal from the Keystone Mines to other places within the Henderson Switching Limits in the absence of specific instructions.

46 Q. How did you get that letter?

A. By mail.

47 Q. Who is R. W. Powell?

A. The agent of the Louisville & Nashville Railroad Co. at Henderson, Ky.

48 Q. State whether or not you are acquainted with the signature of R. W. Powell.

A. Yes, sir, I am.

49 Q. State whether or not the name attached to that letter is the genuine signature of R. W. Powell, Agent of the Louisville & Nashville Railroad Co.?

A. I believe this to be genuine, and the signature of Mr. Powell, the agent of the L. & N.

50 Q. Will you please file that letter with the examiner marked J. H. #4?

A. I herewith file the same marked as requested.

51 Q. Going back to the copy of the letter of July 1, 1908, will you please file that copy with the examiner marked J. H. #5?

A. I herewith file the same marked as directed, and make it part of my deposition.

52 Q. I hand you a paper dated July 7, 1908, addressed to
27 R. W. Powell, Agent, signed "Crescent Coal Co. by Joe Higdon." I will get you to examine that paper, and state what it is?

A. This letter is a confirmation of a telephone communication wherein two cars were ordered placed at the Keystone Mines and loaded with coal and switched to the Henderson Electric Light Plant under the authority of the tariff that now controls their switching arrangements.

53 Q. Is the paper you have the original or a copy?

A. A carbon copy.

54 Q. What became of the original of which that is a copy?

A. It was mailed to R. W. Powell, Agent of the Louisville & Nashville Railroad Co.

55 Q. Had you previous to that letter given any direction by telephone about placing those cars?

A. Yes, sir, I ordered by telephone and confirmed the order by letter.

56 Q. Were those cars placed?

A. No, sir.

57 Q. Do you know how many cars you actually ordered from the Railroad Company to be placed at the Keystone Mining and Manufacturing Co. for loading and shipment to any of the industries in the City of Henderson after July 1, 1908?

A. I don't know the exact number of cars, but I did order daily cars to be switched under the tariff that governs the switching of cars in Henderson until such a time as they offered to handle this coal at the rate of fifty cents per ton, I don't remember that date, but I do remember when they made the offer to handle the coal at fifty cents per tone of asking them for their authority, or to show me a tariff that gave them that authority, and in answer to that letter they declined to furnish any cars at any price.

28 58 Q. At the time these several cars were ordered from the Railroad Co. to be placed at the Keystone Mining & Manu-

facturing Co. to be loaded and switched to the various industries in the City, was the Keystone Mining & Manufacturing Co. in operation?

A. Yes, sir, they were running daily and begging me to fulfill my contract.

59 Q. At the time these orders were given for the shipment of this coal to the plants named please state whether or not you had contracts with the various parties to whom said coal was ordered to be delivered, or to whose plants it was ordered to be switched for furnishing them with the coal ordered in those cars?

A. Yes, sir, I had a contract with the City of Henderson to furnish them coal consumed at the Electric Light Plant, and also a contract with A. Waller & Co. to furnish them the coal they needed about 6,000 tons per year, and a contract with the Henderson Elevator to furnish them their coal. I had a contract with the Henderson Chair Co. to furnish them their coal. I also had an agreement with Jarvis and the Geo. Delvin Co. to furnish them their coal at a stated price, but there was no contract with those two parties as to the amount of coal they should take, it being understood that I should furnish them what was necessary to run their plants.

60 Q. I hand you a letter dated July 13, 1908, purporting to be signed by R. W. Powell, Agent, and addressed to Mr. Joe Higdon. I will get you to examine that letter and state what it has reference to?

A. This is a letter from the agent of the L. & N. Railroad Co. to Joe Higdon of the Cre-cent Coal Co. referring to my various requests for cars to be placed on the switch of the Keystone Mine to be loaded with coal and switched to various industries in Henderson, and in which they state that they cannot furnish cars
29 to be switched under the switching rate, but they are willing to put into effect, when advised by us of its acceptance, a rate of fifty cents per ton from the Keystone Mine to points within the Henderson Switching Limits.

61 Q. Where did you get the letter about which you have just been testifying?

A. I received it by mail.

62 Q. State whether or not the signature is the genuine signature of R. W. Powell?

A. It is his genuine signature.

63 Q. Will you please file that letter with the examiner marked J. H. #6, and make it a part of your deposition?

A. I herewith file the same marked as directed.

64 Q. Will you please file the copy of the letter of July 7th with the examiner marked J. H. #7, and make it a part of your deposition?

A. I herewith file the same marked as directed.

65 Q. Now subsequent to July 13th, when the Railroad Co. quoted you a rate of fifty cents per ton, I will get you to state whether or not they withdrew the proposition to furnish cars at that rate, and if so, what was said?

A. I asked the L. & N. Railroad Co. to show me their authority

for charging fifty cents per ton from the mine to the various industries in Henderson, and they then declined to furnish any cars. They did not show me the authority they had, or cite me to it, but declined to furnish me cars to be shipped from there at any rate.

66 Q. There is filed with the petition in this case a letter dated August 13, 1908, addressed to the Crescent Coal Co. and signed on the typewriter R. W. Powell, Agent. I will get you to examine that letter, and state what it is.

A. This is a letter from Mr. R. W. Powell, Agent of the
30 Louisville & Nashville Railroad Co. referring to his letter of July 16th advising me that he would not furnish the Crescent Coal Co. with empties for loading coal to be switched to the various commercial industries within the Henderson yard limits, wherein he agreed to perform the service for fifty cents per ton, and he states in this letter that he is now in receipt of instructions that they will not undertake to handle this coal at all.

67 Q. How did you receive the letter of August the 13th?

A. I received this letter by mail.

68 Q. Did you ever have any conversation with Mr. R. W. Powell, the agent of the L. & N. along the same line as that shown in the last letter mentioned.

A. Yes, sir, I had a conversation with him about the same subject when he made the same statement verbally that he made in the letter.

69 Q. Was that conversation had before or after receiving this letter?

A. After.

70 Q. In that conversation was any thing said about the letter you have just mentioned, or was it referred to in any way?

A. It was referred to. I told him I had received the letter, and that was the beginning of our conversation on that subject.

71 Q. Did he at that time say he had, or had not written such letter?

A. I don't know that he said he had written the letter, but I told him I had received his letter, and he told me that he had written me just as soon as he had received such instructions.

72 Q. You stated heretofore that from the first day of July up to the 13th of July, when they quoted you a rate of fifty cents, you had daily ordered cars from the Railroad Company for placing at the Keystone Mines, and to be switched to various industries in the City, is that correct?

A. Yes, sir.

31 73 Q. Did you order any such cars after the receipt of that letter?

A. After receiving this letter I continued to order cars for a short period until I was told point blank that they would not furnish them, and that these instructions were final.

74 Q. Well, here is a letter dated July 16, 1908, addressed to the Keystone Mining and Manufacturing Co., and signed on the typewriter R. W. Powell, Agent. Will you please examine that letter, state how you received it, and what it is?

A. This is a letter from Mr. R. W. Powell, agent of the L. & N. which indicates by its heading that the Keystone Mining & Manufacturing Co. and the Crescent Coal Co. had received the same letter with reference to switching coal within the yard limits, wherein they ask us to understand that they will furnish cars for this movement on the basis of fifty cents per ton. This letter was received by mail.

75 Q. Will you please file that letter, marked J. H. #8, and make it a part of your deposition?

A. I herewith file the same as requested.

76 Q. Do you remember whether or not on August 26, 1908, you order- an empty car from the defendant company to be placed at the Keystone Mining & Manufacturing Co. for loading, and then to be switched to A. Waller & Co.

A. I do remember that on that date we ordered a car from the L. & N. Railroad Co. to be placed at the Keystone Mines to be loaded with coal and switched to the plant of A. Waller & Co., both points were connected with the Louisville & Nashville Railroad Co. and both of them have switches to their plants connecting with the main line of the L. & N., and the sum of four dollars was tendered to the agent to pay the switching charge named in the tariff governing switching in the City of Henderson.

32 77 Q. How was that $4.00 tendered? In what kind of money?

A. Silver money, I think. Four silver dollars.

78 Q. At the time of making that tender did you put your order for such car in writing?

A. Yes, sir.

79 Q. I hand you a paper dated August 26, 1908, addressed to Mr. R. W. Powell, Agent, but not signed. I will get you to examine that paper and state what it is, or what it purports to be?

A. This is a copy of a letter written to Mr. Powell at the time the order was made for the placement of the car that I just spoke of, and at the time the tender of the $4.00 was made for switching and car rental.

80 Q. What was done with the original of which that is a copy?

A. It was sent to Mr. Powell.

81 Q. Do you know whether it was sent by mail or delivered in person, or not?

A. I think that letter was delivered by a messenger.

82 Q. Will you file the copy you have marked J. H. #9, and make it a part of your deposition?

A. I herewith file the same.

83 Q. State whether or not Mr. Powell, the agent of the Railroad Co. or the defendant, placed the car as directed in that letter of August 26th?

A. They did not place it. They declined to place it, and declined to accept the money.

84 Q. Do you remember whether he gave you any reason for declining to furnish the cars at that time?

A. No reason further than that stated in the letter filed previous to this question, where he declined to furnish them at any price

85 Q. About how many conversations did you have with
33 Mr. Powell with reference to furnishing cars under this arrangement?

A. I don't know the number of conversations, but it seems to me that I ordered cars daily for quite two weeks. Quite frequently I saw him at the plant of the Henderson Elevator Co. where I am employed, and I went to see him regarding the placing of these cars. As to the actual number of times I could not say.

86 Q. At these various times what answer did he give about placing the cars as requested?

A. In the beginning, or first few times, he stated he did not have the authority, or in the absence of any specific instructions he did not wish to place the cars. Afterwards, or later on during the period spoken of, he would always, or a number of times, offered to furnish them at a rate of fifty cents per ton, which I always declined to accept because the tariff specifies a charge of $4.00 per car.

87 Q. Well, after the letter in August when he stated that he would not furnish the cars at all, what reason did he give in addition to that stated in the letter, if any?

A. I don't remember at this time that he gave any additional reason, or gave any reason why he would not furnish them other than that he had instructions not to furnish them.

88 Q. State whether or not during any of this time Mr. Powell ever stated the Railroad Co. claimed that they were unable to furnish the cars on account of any car shortage, or inability to procure cars?

A. No, sir, he did not.

89 Q. During the period from July 1, 1908, to July 1, 1909, were you familiar with the tariff conditions and car supply at this point?

A. Yes, sir.

34 90 Q. Was there at that time a shortage of cars, or was the car supply abundant?

A. There was no shortage at the time. There was an abundance of cars to my knowledge as superintendent of the Henderson Elevator Co. We ordered cars each day to be loaded, and we were always able to secure the cars we wished, and did not have trouble at any time in securing cars.

91 Q. Of the cars ordered by you from July 1, 1908, how many, if there were any, were ordered only for the purpose of seeing whether the Railroad Co. would furnish the cars, and how many were ordered in good faith for the purpose of being delivered to the parties to whom they were ordered delivered?

A. They were all ordered in good faith. I was anxious to have my contracts filled.

92 —. If the Railroad Co. had furnished the cars, were there any cars ordered by you to be loaded and shipped as directed except such

as would have been received by the parties to whom they were ordered delivered?

A. They would all have been received. They were sold and ordered from me by them before I ordered them out from the Keystone Mining & Manufacturing Co.'s works, or ordered the Railroad Co. to place them there.

93 Q. You have stated once, but I will get you to state again how many tons of coal you sold in car load lots between July 1, 1908, and July 1, 1909?

A. The total tons of coal sold by the Crescent Coal Co. from July 1, 1908 to July 1, 1909, was 14,843 tons.

94 Q. And what was the rate of freight you paid on that coal?

A. Fifty cents per ton.

95 Q. Under the tariff of the Louisville & Nashville Railroad Co. of $4.00 per car you have stated that the rate was about ten cents per ton. If the Railroad Co. had furnished the cars, and
35 you had supplied this fourteen thousand and some odd tons to your trade, what would have been the difference in the freight paid by you under this arrangement and what you did actually pay by getting the coal elsewhere?

A. The difference in the freight rate would be forty cents a ton.

96 Q. Do you — whether or not the Keystone Mining & Manufacturing Co. was ready to comply with its contract and deliver the coal as ordered by you at the rate of not exceeding two thousand tons per month?

A. (Yes, they seemed rather anxious to fulfill their contract, and called me quite frequently by phone and told me they were prepared and ready to fill their part of the contract, and asked me to take the coal. I state that I was making every effort possible to secure cars, but that the Railroad Co. was refusing to furnish them under rates named in their switching tariff, and in another conversation after that, when they stated they were ready to fulfill their part of the contract, I had to tell them the Railroad Co., had declined to furnish cars at any price per ton.) They were always ready to fulfill their part of the contract.

97 Q. Of the fourteen thousand and some odd tons of coal that you actually delivered to your customers in car load lots from July 1, 1908, to July 1, 1909, what profit per tone on an average did you make?

A. During July, August, September, and part of October, and perhaps all of October, all the steam coal that I delivered within the City of Henderson was delivered without any profit. I anticipated in the contract with the Keystone Mining & Manufacturing Co. a profit of forty cents per ton when I made these contracts, but the price I had to pay for coal in the open market after the Rail-
36 road Co. had refused to handle the coal was such that the price of the coal *was such that the price of the coal* and freight paid on the coal equaled the contract price that I had during those four months there was no profit on any steam coal that I furnished. If any, it was never at any time over five cents a ton on

any part of it, but I remember the majority of the coal that I furnished at those times that the cost price equalled the selling price.

98 Q. How after those four months?

A. I bought coal five cents a ton cheaper in some cases, and at a period beyond that I was enabled to make another larger contract—had to to save myself—and then on perhaps two-thirds of the steam coal furnished I made a profit of ten cents per ton—that is gross profit.

99 Q. On the total year's business from July 1, 1908, to July 1, 1909, what in your opinion would have been the actual profit over and above what you did receive if the Railroad Co. had furnished the cars to the plant of the Keystone Mining & Manufacturing Co., and had switched the same to the industries as ordered by you at the rate of $2.00 per car rental, and $2.00 per car switching charge?

A. My profit would have equalled forty cents per ton more than I did actually make out of any of those contracts, or all of the contracts I made, and would equal something over $6,000.00.

100 Q. Now in addition to that state whether or not, in your opinion, you could have sold more coal and supplied the entire amount of 2,000 tons per month, or 20,000 tons per year contracted for in your contract with the Keystone Mining & Manufacturing Co.?

A. I could have sold the entire tonnage that the contract called for. I could have sold more in fact. The price that I had
37 secured from the Keystone Mining & Manufacturing Co., and the rate of freight would have enabled me to have sold to all steam users in Henderson, provided the Keystone Mining & Manufacturing Co. could have furnished the coal, and they stated to me that they could furnish more coal than they had contracted me to furnish, and on the strength of their statement I secured from them a contract as their general sales agent, which gave me the right to all coal that they could mine and load in cars. I mean, of course, as I stated before, beyond the amount they consumed for their wagon trade.

101 Q. If you sold in car load lots only 14,000 tons of coal during that period upon what do you base the statement that you could have sold as much as two thousand tons per month if the Railroad Co. had furnished cars?

A. When I made this contract I went on the open market in Henderson and reduced the price of coal five cents per ton, and made a contract on that basis with every man that I went to see about the coal. It was cheap coal, and when the Railroad Co. refused to furnish the cars I had to stop selling, and then scramble for sales. The fact that the contract was made at the price it was, and the switching rate was what it was, $2.00 per car, would have enabled me to sell the entire output of the mine.

102 Q. At what profit to yourself?

A. Forty cents per ton.

103 Q. You have just handed me a book marked on the outside "Terminal Tariff of the Louisville & Nashville Railroad Co., containing rates, rules and regulations, etc.," issued April 1, 1908 effec-

ice May 4, 1908. I will get you to state where you obtained that book or tariff?

A. I made application to Mr. R. W. Powell, Agent of the Louisville & Nashville Railroad Co. for the tariff that governed their switching rules with the City of Henderson, and received that book from him.

104 Q. At pages 130 and 131 of that book appears the rates, rules regulations governing the switching of cars at Henderson, Ky. Is that the tariff under which you demanded of the Railroad Co. that it furnish cars for the purpose above stated at $4.00 per car?

A. Yes, sir.

105 —. You say the tariff was furnished you by the agent of the Louisville & Nashville Railroad Co. as the tariff in force at that time?

A. Yes, sir.

106 Q. Do you know whether any tariff was ever promulgated or filed in the office of the L. & N. Railroad Co. changing the tariff named?

A. No, sir.

107 Q. That Terminal Tariff, I believe, relates not only to the City of Henderson but to other points on the Louisville & Nashville Railroad Co. does it not?

A. Yes, sir.

108 Q. Will you please file that Terminal Tariff with the examiner marked J. H. =10, and make it a part of your deposition in this case?

A. I herewith file the same as requested.

109 Q. Do you know of your own personal knowledge whether or not during the period covered by your contract with the Keystone Mining & Manufacturing Co., that is from July 1, 1908 to July 1, 1909, the L. & N. Railroad Co. furnished cars for shipment between the various industries in the City of Henderson in business other than the coal business?

A. Yes, sir. I know that they did.

110 Q. Give the names of the persons to whom such cars were furnished about which you have personal knowledge, and the points to which the contents of the cars were shipped or delivered?

A. I know the Henderson Elevator Co. shipped corn to the Distillery of Henry Kraver at a rate of $4.00 per car as named in the tariff that I have just filed, and that A. Waller & Co. have also shipped to Henry Kraver under the same tariff, and that the Henderson Elevator Co. shipped cobs to the elevator of A. Waller & Co.

111 Q. Do you remember whether since August 26, 1908, you have had any further conversation with Mr. R. W. Powell about furnishing cars to the Keystone Mining Co. for shipment to various industries in the City, and whether or not you ever inquired of him as to whether the instructions about refusing to furnish such cars had been superseded or withdrawn, and if so, state when you had the last conversation with him on the subject.

A. I do not remember the dates or times when I had such con-

versations, but I have talked to him two or three times since about this subject. He did not state in any one of those conversations that his instructions had been withdrawn.

112 Q. Did he state whether the rule that he could not furnish the cars was still in force or not?

A. I do not remember that he stated that it was still in force, but the inference was that it was still in force. He did not state that they were not in force, or had been withdrawn.

113 Q. Did the Louisville & Nashville Railroad Co. through any of its officers, or Mr. R. W. Powell, as agent, ever withdraw the statements contained in their letter to you of August 13, 1908, in which they notified you that they would not undertake to handle this coal at all?

A. No, sir, they have not.

114 Q. Do you know whether the L. & N. Railroad Co., or Mr. R. W. Powell, as agent, had any notice or knowledge of your
40 contract with the Keystone Mining & Manufacturing Co.?

A. No, sir, I do not.

115 Q. Did you ever tell them that you had such a contract?

A. Not until after the contract was made, and after they had refused to furnish the cars.

116 Q. That is what I have reference to, did you, or not, after the Railroad Co. refused to furnish the cars inform them of the contract you had with the Keystone Mining & Manufacturing Co.?

A. Yes, sir.

117 Q. Did you ever give them notice as to what the result would be if they failed to furnish the cars as requested?

A. I told Mr. Powell that I had a contract with the Keystone Mining & Manufacturing Co., and if I did not fulfill it, I would no doubt be sued as I had given bond for its performance, and that unless he was willing to handle these cars under the switching tariff I would sue the Company.

118 Q. You notified him then that you could hold the Company responsible for failure to furnish cars?

A. Yes, sir.

119 Q. Mr. Higdon, do you know anything about the total tonnage of steam coal consumed in the City of Henderson per year?

A. The total tonnage of steam coal used in Henderson annually is about 55,000 tons.

120 Q. Where did you get your information on that point?

A. The information that I have on that point is the copy compiled by the Henderson office of the Louisville & Nashville Railroad Co. in June, 1909. The Railroad Co. got their information from the various coal mines and dealers within the City of Henderson, receiving from them information as to the various amounts the
different industries used. Mr. Powell called on me for the
41 number of tons of coal that I furnished the Electric Light Plant, Elevator, Chair Factory, and other contracts, and told me that he was compiling a statement showing the number of tons of steam coal annually used in Henderson, and I asked him to give

me a copy when he completed it, and the paper you have in your hand is a copy furnished me by Mr. Powell.

121 Q. So that list of the coal consumers and the number of tons consumed by each that you now have is taken from a compilation made by the local office of the L. & N. Railroad Co. and furnished to you?

A. Yes, sir.

122 Q. Who furnished that statement to you?

A. Mr. Powell?

123 Q. What Mr. Powell?

A. Mr. R. W. Powell, the agent of the Louisville & Nashville Railroad Co.

124 Q. Is the list you now have the same list that was furnished to you by Mr. Powell?

A. No, this is not the same list, but is an exact copy.

125 Q. Who made the copy?

A. Mr. Twedell, the stenographer at the Henderson Elevator.

126 Q. What was done with the original from which that copy was taken?

A. I still have it in my possession and expect to return it to Mr. Powell at his request.

127 Q. Do you know that the paper that you have now is a copy of the statement you have from Mr. Powell?

A. Yes, sir, I checked it over personally.

128 Q. Will you please file that paper with the stenographer marked J. H. #12.

A. I herewith file the same as requested.

129 Q. Well, here is a paper dated May 26, 1908, signed Crescent Coal Co. and A. Waller & Co., which purports to be a contract
42 made by the Crescent Coal Co. and A. Waller & Co. for the delivery of 6,000 tons of coal for a period beginning July 1, 1908. Is that the contract made between your company and A. Waller & Co. about which you have testified in your deposition?

A. Yes, sir.

130 Q. Will you please file that contract marked J. H. #13 and make it a part of your deposition?

A. Yes, sir.

131 Q. Here is a contract dated the 31st day of March, 1908, for furnishing coal to the Water Works of the City of Henderson, is that the contract about which you have testified in your deposition?

A. Yes, sir.

132 Q. Will you please file that contract, mark it J. H. #14, and make it a part of your deposition?

A. Yes, sir.

Adjourned to meet at two o'clock p. m. January 13, 1910.

Met pursuant to adjournment at two o'clock P. M. January 13, 1910.

Direct examination by Mr. JAS. W. CLAY, attorney for plaintiff:

133 Q. Mr. Higdon, what was the custom of doing business between the Crescent Coal Co. and the Louisville & Nashville Railroad Co. from the time you first engaged in the coal business up to this time with regard to the payment of freight and car rentals on coal handled by the Crescent Coal Co.?

43 A. Well, the Crescent Coal Co. when it sought to have a car switched from one point to another, the custom is that we ordered that work done by telephone, then that charge is made against the Crescent Coal Co. and is collected weekly; also the freight charges on cars arriving over the L. & N. Railroad is charged to the Crescent Coal Co. and the freight account is collected weekly.

134 Q. Has the freight account of the Crescent Coal Co. been on a cash basis, or on a weekly settlement basis?

A. There is, nor has been no agreement between us as to the manner of collection or settlement, but the custom is that he brings his bills, or the agent sends his bills down weekly, and they are then paid by check.

135 Q. In your dealings with the L. & N. Railroad Co. have you ever been required to pay the cash or tender the cash before being furnished cars during your business?

A. No, sir, we have never been demanded to pay the cash at any time. On cars arriving over their line the freight charges attached would be placed upon our account and usually collected the same week, perhaps on Monday. There was no stated period, but I remember that the freight bill- were paid about once a week.

136 Q. You stated on yesterday that the Louisville & Nashville Railroad Co. switched one car of coal for the account of the Crescent Coal Co. from the Keystone Mining & Manufacturing Co. to the Electric Light Plant, and charged $2.00 for the service. Do you know of your own personal knowledge of any similar service performed by the L. & N. for any other person or corporation?

A. Yes, sir, they switched a car of coal from the Keystone Mining & Manufacturing Co. plant to the plant of the Henderson Elevator Co., and they have on two occasions switched coal for the account of the Crescent Coal Co. from the yards of R. A.

44 Powell to the Electric Light Works. They have also switched for the account of the Crescent Coal Co. a number of cars, possibly fifty or more from the Illinois Central Railroad Co. to the Electric Light plant. Those cars arrived over the Illinois Central billed and consigned to the Crescent Coal Co. and sold to the Electric Light Plant, and were rebilled and ordered placed by telephone, and were so placed by the Louisville & Nashville Railroad Co., and they charged $2.00 for the service on each car.

137 Q. These two cars of coal shipped from R. A. Powell & Co. to the Electric Light Plant were cars of coal which you ordered

from R. W. Powell, and were shipped to the Electric Light Plant at the Special instance and request of the Crescent Coal Co.?

A. Yes, sir.

138 Q. The fifty or more cars that they switched from the I. C. were cars of coal that you had ordered from other points, and which arrived in Henderson over the I. C. and switched to the Electric Light Plant, or various industries, where ordered delivered?

A. Yes, sir.

139 Q. Do you know whether the Louisville & Nashville Railroad Co. has at any time refused to switch cars from the Crescent Coal Co. from industries located on their tracks to other industries located on their tracks in the City of Henderson?

A. They never at any time refused to perform switching services for the Crescent Coal Co. when requested from the Illinois Central Railroad to industries, or from one industry to another, except when such service was requested between the Keystone Mining & Manufacturing Co.'s Plant and the various industries in the City of Henderson.

Cross-examination by Mr. MALCOLM YEAMAN, attorney for defendant:

45 1 Q. Where is the Keystone Mining & Manufacturing Company's shaft and plant situated?

A. It is situated on the Louisville & Nashville Railroad near a country road, possibly the Air Line Road. I think it is near the intersection of the Air Line Road and the L. & N.

2 Q. What street of the City of Henderson would it be on if that street were extended?

A. I do not know.

3 Q. It is in the City of Henderson is it now.

A. I should judge so.

4 Q. Is there any railroad station or stopping place at that plant?

A. There is no railroad station or regular stopping point there to my knowledge other than they have a switch leading from the main track into that industry.

5 Q. Who owns and controls that switch that leads from the track of the Louisville & Nashville Railroad Co. to and into the Keystone Mining & Manufacturing Co.'s plant?

A. I do not — owns them, but so far as my experience goes with Railroad Companies they usually have control.

6 Q. That is not responsive to my question. If you know who owns and controls those switches say so.

A. I don't know who owns them, but I believe that the railroad companies control all private switches. Their switchmen carry the keys to all switch-locks, and as a rule industries located on those switches are not permitted to have keys, and for this reason I state that I believe the Railroad Company controls them.

7 Q. Have you any knowledge of who controls the switch from the Louisville & Nashville Railroad track into the Keystone Mining & Manufacturing Co.'s plant? If so, say so, but do not give any guesses.

A. I have no other knowledge other than as stated.

46 8 Q. This plant is within what is known and called the switching limits of the City of Henderson, is it not?

A. Yes, sir.

9 Q. When did the Keystone Mining & Manufacturing Co. commence mining coal?

A. I am not familiar with the date, but I think it was perhaps the year 1906.

10 Q. Did they not commence to sink the first shaft early in 1906?

A. I am not sure as to that date.

11 Q. How long before the date of your contract beginning July 1, 1908, did they commence mining coal?

A. I do not know—possibly two years.

12 Q. To what extent had they taken out coal at the time you made that contract? Give some idea of the quantity taken out, and to what extent the mine was operated?

A. I understand from Mr. Bosserman that they were in a position to mine one hundred and fifty tons a day.

13 Q. Had they ever mined that quantity, or any thing like that quantity to your knowledge?

A. Not to my knowledge, no, sir.

14 Q. Don't you know that they had not?

A. No, sir, I do not.

15 Q. Where had they disposed of their coal up to the time of your contract?

A. I do not know.

16 Q. You were living in the City of Henderson?

A. Yes, sir.

17 Q. You were engaged in the coal business?

A. Yes, sir.

18 Q. And you had no idea at all of what quantity of coal was taken out and where it was disposed of?

47 A. I don't know where they disposed of the entire output. They did sell coal locally to residents of Henderson and the Manufacturing plants in the City of Henderson.

19 Q. How did they deliver the coal that they took out up to the time you made your contract with them, and since?

A. Coal sold to the families, or residents, and the manufacturing plants, or industries was delivered in wagons, but the coal that they shipped out of the City I presume was in cars.

20 Q. Do you know of their ever having shipped any coal out of the City by train or otherwise?

A. I have no personal knowledge of the fact, but Mr. Bosserman stated they shipped coal to Owensboro and Evansville. I stated that I had no personal knowledge of coal shipped, but I do *not* know of some two or three cars of coal that were placed on the tracks near the plant of the Henderson Elevator Co., and I was told it was Keystone Mine coal *in* route to Owensboro.

21 Q. How many wagons about did they employ in delivering coal for domestic purposes and coal for manufacturing purposes?

A. I do not know.

22 Q. Have you any idea?

A. No, sir, I have not.

23 Q. You say now that you have no idea at all of how many wagons the Keystone Mining & Manufacturing Co. employed?

A. I have not.

24 Q. Is that mine running now?

A. I think not.

25 Q. Don't you know?

A. I know that it has not been running this season, but there has been talk of it starting up recently, but I feel reasonably
48 sure they are not digging now, but I have no personal knowledge not having been on the premises.

26 Q. How long has it been closed down according to your best judgment?

A. I am not sure. I think that they closed sometime about the first of this year.

27 Q. The first of 1910?

A. The first of 1909.

28 Q. According to your best judgment then the mine has not been running since the first of January, 1909?

A. I do not know the exact time.

29 Q. Can you fix the date from which the mine has not been taking out coal since the first of the year?

A. I do not know the exact date, but I will say that I think the mine ceased to take out coal about May 1, 1909.

30 Q. Your answer now is that according to your best judgment the mine has not been running since the first of May, 1909?

A. Yes, sir.

31 Q. Now according to your best judgment what quantity of coal were they taking out from the first of July, 1908, to the first of May, 1909?

A. I have no data with which to form a statement other than the statements Mr. Bosserman made. He told me they were getting out from 85 to 120 tons a day and could easily bring up 150 tons, and if I could get in a position to take up my contract, he could put in men sufficient to double that amount.

32 Q. And with the exception of the cars that you have mentioned that were shipped to Owensboro and Evansville the coal they took out up to the time they closed in May, 1909, was delivered by wagons?

A. Yes, sir, if they did any shipping beyond those I have mentioned I have no personal knowledge of the fact.

49 33 Q. Who drew the contract, or the proposition and acceptance, constituting a contract dated April 5, 1908, being exhibit No. 1 filed with your direct examination?

A. Messrs. Clay & Clay.

34 Q. That is a proposition made by the Keystone Mining & Manufacturing Co. to your attorneys, Messrs. Clay & Clay. Why was the negotiations made through attorneys rather than by yourself direct?

A. I had reasons why I did not want the Keystone Mining Co. to know that the Crescent Coal Co. was seeking that contract.

35 Q. You filed a letter, being exhibit No. 3, dated July 2, 1908,

which purports to confirm a telephone conversation ordering two empty coal cars. Why did you follow your telephone message with a written letter in that instance?

A. The agent had refused to place the cars by telephone, and I followed it by letter that he might have legal notice.

36 Q. And in your letter to Mr. Powell, dated July 1, 1908, being exhibit No. 5, that was a confirmation of a telephone message ordering two empty cars, you wrote that letter for the same reason—to preserve legal evidence of the fact that you ordered the cars?

A. I wrote that letter in order that Mr. Powell might have legal notice, as I said before, and in order that I might have evidence of the fact that I did order them.

37 Q. And you make the same answer to the same question in regard to the letter of July 7, 1908?

A. Yes, sir, the same answer.

38 Q. Then you filed a copy of a letter addressed to Mr. Powell, dated August 26, 1908, being exhibit No. 9, in which you say that you tender them $4.00 lawful money of the United States for switching service and car rental, why did you go — the trouble of making a legal tender of silver dollars for that service?

50 A. I wanted to make my record complete. I had a valuable contract, and I was losing money under that contract by the fact that the Louisville & Nashville Railroad Co. would not move the coal under the rules governing their switching tariff, and for that reason I made that offer.

39 Q. Your attorneys drew that paper of August 26, 1908, did they not?

A. I don't know whether they drew that paper, or whether it is in my own dictation.

40 Q. You stated awhile ago that the customary course of business between you and the Louisville & Nashville Railroad Co. was when you wanted a car moved, or a car of coal switched to telephone to Mr. Powell, the agent, and tell him what you wanted?

A. Yes, sir.

41 Q. He recognizes that telephone communication does he not?

A. Yes, sir.

42 Q. Do you follow those telephone communications with written letter?

A. Not always.

43 Q. Do you in any case, or have you in any case, except in the cases in which you have filed your letters following these telephone communications?

A. No, sir.

44 Q. And you stated that the customary course of business was to settle freight bills once a week by check?

A. Yes, sir.

45 Q. You never think of making a legal tender in money for freight bills, either before or after the freight is moved?

A. No, because they never refuse to move the freight. If they would refuse to move the freight, it would be a matter of necessity that I take up the money to them.

51 46 Q. You spoke of one car of coal that was switched from the Keystone Mining & Manufacturing Co. for you to the Electric Light Plant in the City of Henderson, when was that car moved?

A. I don't remember the date, but I think it was between the time that I had the option I had on that contract and the time of signing it.

47 Q. It was before you entered into a written contract in the name of your attorneys, Messrs. Clay & Clay, that is before April 5, 1908?

A. Yes, sir.

48 Q. What other car of coal, if any, has the L. & N., or any other railroad coming into the City of Henderson moved from the Keystone Mining & Manufacturing Co. to industrial plants in Henderson, or from one industrial plant to another in Henderson within your knowledge?

A. The L. & N. moved a car of coal for the Henderson Elevator from the Keystone Mining & Manufacturing Co.'s plant.

49 Q. When was that car moved to the Elevator?

A. That was prior to the time this option was taken.

50 Q. Who requested that car to be moved?

A. I think Mr. Bullitt. Mr. Bullitt bought it, but just who ordered it switched I don't know.

51 Q. Is that the Elevator Co. you are connected with?

A. Yes, sir, and when that car was switched to the Elevator Co., and I saw such a saving in freight, then I sought this option.

52 Q. Did you at any time before you entered in to the contract of April 5, 1908, go the Louisville & Nashville Railroad Co. or any one representing it, to know if they would switch coal from the Keystone Mining & Manufacturing Co. to industries in the City of Henderson?

52 A. No, sir.

53 Q. Did you sell the load of coal to the Electric Light Plant switched by the L. & N.?

A. Yes, sir.

54 Q. The Electric Light Plant stood in need of that coal at that time did they not?

A. No, sir, I don't know that they needed the coal on the day it was switched, but I was under contract to furnish them coal, and that was part of the coal I was furnishing. If you mean that they were in distress, I would say not.

55 Q. And you got that car switched in order to ascertain if the Railroad Co. would render such services?

A. Yes, sir.

56 Q. You got that car switched in order to establish a precedent that they would do such shipping?

A. I got the car switched in order to ascertain whether they would do such service. If they would, then I wanted the contract. If not, I did not want the contract, and when they did switch the coal, I felt it was a good contract, and accepted the option.

57 Q. Instead of resorting to that means to ascertain whether

they would switch the coal or not, why did you not go direct to them, and see if any such arrangement could be made?

A. I don't know. It never occur-ed to me to do it.

58 Q. When was it you told Mr. Powell, the agent, that you would probably have to sue the Louisville & Nashville Railroad Co. for not moving the coal for you?

A. I don't remember the time, but it was done some time after the beginning of the contract, and after he had repeatedly refused to furnish cars and do the service.

59 Q. Now, it is not a fact that from the time you first got the option from the Keystone Mining & Manufacturing Co. up
53 to the time you closed and from that time on down that you contemplated having, and expected to have a suit with the L. & N. about the matter?

A. No, sir, that is not a fact.

60 Q. Have you not taken every step from the beginning with the view of preserving evidence to use in a suit against the L. & N.?

A. After they refused to furnish cars I began keeping a record of their refusal to furnish them, because their switching tariff provides for such service, and I felt like I was entitled to it the same as other shippers in Henderson.

61 Q. What other shippers in Henderson do you allude to?

A. The Henderson Elevator Co., A. Waller & Co., Henry Kraver, Sandefur Milling Co., and Farless & White.

62 Q. Now, state what character of freight, or commodities have been switched by the L. & N. Railroad Co. for the persons, firms, or corporations just named, and from what point to what point have they been moved?

A. The Henderson Elevator Co. has sold the Sandefur Mill wheat, and it would be switched by the Henderson Elevator Co.'s engine over the L. & N. tracks to the Sandefur Mill. The Henderson Elevator Co. also sold corn to Henry Kraver, which was switched from the Henderson Elevator by the Louisville & Nashville Railroad Co. to the Distillery. The Railroad Co. has also done like service for A. Waller & Co. to Mr. Kraver's plant, and both the Henderson Elevator Co. and A. Waller & Co. have shipped wheat and corn on the switching rate from their plants to Sandefur's Mill and Farless' Mill, and also to Marshall & Alves.

63 Q. When was this switching done?

A. It is being done now, and has been done since I have been a resident of Henderson—about thirteen years. Prior to May 4,
1908, that service was performed at $2.00 a car, and since
54 that time they have added $2.00 for car rental, making a total charge of $4.00.

64 Q. How long did you say you had been engaged in the coal business?

A. I think since November, 1907.

65 Q. Where was the coal that you sold mined?

A. My coal yard is located on Second St. on a switch belonging to the I. C. Railroad Co., but some of the coal I handled came

from mines located on the Illinois Central, and other coal from mines located on the L. & N.—from Hopkins County.

66 Q. Did any of it come from mines located within the switching limits of the City?

A. I handled during the summer of 1908 several cars of coal that was bought from the Keystone Mine and furnished to me under this contract where the Illinois Central furnished the L. & N. cars after the L. & N. had refused to furnish me the cars to do the switching service, and the L. & N. switched the cars from the I. C. to the Keystone Mining & Manufacturing Co.'s plant, and they were loaded there and brought back to the I. C.

67 Q. How many cars were handled in the manner stated by you in the last answer?

A. I am not sure, some ten or twelve.

68 Q. Were these cars that you have just spoken of delivered to the purchasers, or consumers in cars on the switches, or were they taken to your yard where coal was hauled out?

A. They went to my yard, and were unloaded in wagon. Those ten cars were all domestic coal.

69 Q. You mean coal used in families and not for manufacturing purposes—not sold in car lots?

A. Yes, not sold in car lots.

70 Q. Then all the coal that you handled, with the exception of one car that the L. & N. switched to the Electric Light
55 Plant in the City of Henderson, was sold and delivered in wagon load lots?

A. Yes, sir.

71 Q. You spoke in your direct examination in several instances of having sold and delivered 17,000 tons of coal, between what dates did you sell that quantity and where was that coal mined?

A. That coal was sold between July 1, 1908 and July 1, 1909, during the life of that Keystone Contract. The coal was mined—quite a lot of it came from mines located on the I. C. and quite a lot from mines located on the L. & N.

72 Q. None of it was from any mine located within the switching limits of the City of Henderson?

A. No, sir, other than the ten cars I have just spoken of.

73 Q. You spoke of a letter filed with your petition in this case, dated August 13, 1908, why did you order cars for the movement of coal from the Keystone Mining & Manufacturing Co.'s Plant after receiving that letter?

A. Mr. Powell had promised me that whenever he received any other instructions, or any instructions that would permit him, that he would be glad to furnish the cars and move the coal. Under my contract I had a profit of forty cents per ton on every ton of coal that I moved from the mine more than I would have under coal coming in under the freight rate of fifty cents, and I was anxious that they furnish cars to move the coal, in fact if they would agree to move it now, I would be willing to renew my contract.

74 Q. If you could get the coal moved at ten cents a ton, you could undersell almost any other producer, could you not?

A. Yes, sir.

75 Q. Would not a rate of ten cents a ton be quite a discrimination against other mine owners and coal dealers who are

56 shipping coal to and selling coal in Henderson?

A. In my opinion it would not be a discrimination, because the Keystone Mining & Manufacturing Co. is the only mine located on the Railroad that is prepared to ship coal in car lots in Henderson or out of Henderson, and if I happen to know a little more of the tariff than the others, I don't see why taking advantage of that knowledge would be a discrimination against them.

76 Q. Did I understand you to say that the Keystone Mining & Manufacturing Co. was the only mine in Henderson or out of Henderson that is prepared to furnish coal in car load lots?

A. No, sir, I said that the Keystone Mining Co. was the only mine prepared to ship coal in car load lots either in Henderson or out of Henderson.

77 Q. Where does the greater part of the coal consumed in the City of Henderson come from at this time?

A. I am not prepared to answer that question. There are several coal dealers in Henderson, and two coal mines, and just who enjoys the largest business, I do not know. Each coal dealer represents a different mine.

78 Q. Is not a large proportion, very much more than half of the coal consumed in Henderson for either domestic or manufacturing purposes, brought from mines located outside of the City of Henderson, principally say in Hopkins County on the L. & N. and from other mines on the L. H. & St. L., and mines in Union A. Webster Counties on the I. C. railroad?

A. There is a large proportion of the coal consumed in Henderson brought in over the L. & N. Railroad, but just what per cent. or what part of the total consumption is brought in, I am not prepared to say.

79 Q. You are and have for some time been in the coal business. Now, in your judgment what proportion of the coal consumed in Henderson is mined in Henderson County and what propor-

57 tion is mined outside the County?

A. I filed a paper yesterday showing that the total consumption of steam coal in Henderson was 55,000 tons, and showing the fact that the Crescent Coal Co. had under contract some 17,000 tons of the 55,000 tons, and the fact that there are other dealers that furnish steam coal that arrives on the L. & N., and that two-thirds of the steam coal sold in Henderson is what is known as railroad coal, but I have no knowledge whatever and no idea what the number of tons of domestic coal used in Henderson is, but I might give you some idea from this statement—that I only run three wagons, and with them I deliver between four and five tons annually, and the statement was made that the People's Mine had thirty-six wagons employed, just how many tons they haul I do not know.

80 Q. About how many wagons do the other coal dealers employ to your best knowledge?

A. I am of the opinion that Nicholson runs about ten or fifteen, Mrs. Shelby three or four, Mr. Conway two, and I don't know about Marshall & Alves, four or five I should judge, and R. A. Powell runs quite a number of wagons, and Branson I don't know anything about.

81 Q. When was this statement of the number of tons of steam coal, amounting to 55,013 tons made, and by whom was it made, and at whose request was it made?

A. I don't remember the exact date, but I think it was in June, 1909, that the statement was made. Mr. Powell of the L. & N. Railroad got up the list, and when he called on me for the names of the industries to whom I furnished coal and the amounts consumed, and told me the reason he desired to know was in order to prepare a statement of the consumption of steam coal in Henderson as well as the supply, I requested him to give me a copy when he completed it, which he did.

58 82 Q. What do the initials in front of each name on that list indicate?

A. They indicate the source of supply indicated in the foot note.

83 Q. How many, and which of the customers of steam coal named on that list have their plant on switches connected with the L. & N. Railroad, or any other railroad that comes into the City of Henderson?

A. The Henderson Brewing Co., The Henderson Electric Light Plant, A. Waller & Co., Henderson Elevator Co., The Geo. Delker Co., The Henderson Roller Mills, The Worsham Distillery Co., which is Henry Kraver, The Henderson Cotton Mill, and the Marstall Furniture Co., Coquillard Wagon Works, Henderson Box & Baskett Co., that is all to my knowledge unless William Elliott's tobacco factory is on the L. & N. R. R. switch.

84 Q. Is not the coal consumed by all those plants, those on switches and those not on switches delivered to them in wagons?

A. No, sir.

85 Q. Which of them have coal delivered in car load lots and in cars?

A. The Henderson Brewing Co., The Henderson Electric Light Plant, A. Waller & Co., The Henderson Elevator Co., Geo. Delker Co., Henderson Cotton Mills, Wagon Works, those to my knowledge have coal delivered to them in car load lots in cars.

86 Q. Where does the coal come from—that is; where is it mined that is delivered to the plants above named in car load lots and in cars?

A. From various places, some from Baskett, some from Spottsville, some from Hopkins County, some from Sebree, some from Morganfield, and some from Waverley, Uniontown, and Sturgis. Those last three points are located on the I. C.

87 Q. None of it is mined within what you term the
59 switching limits of the City of Henderson?

A. They are not receiving any deliveries now from coal

mined with the City of Henderson, but as to whether they received such coal in wagons I do not know.

88 Q. When did you get the terminal tariff book that you have filed as exhibit #10?

A. I think I got that in May, 1908.

89 Q. For what purpose did you procure that?

A. Mr. Powell told me that he had a new switching tariff superseding the old one that the Henderson Elevator had, the one I was familiar with, and I made application for one of the new tariffs, and he got it for me. I was a coal dealer and had quite a lot of shipping to do, and had this contract under contemplation.

90 Q. All you wanted was what appears at page 130 under the head lines, "Rate, rules and regulations governing the switching of cars at Henderson, Ky." was it not?

A. Yes, sir.

91 Q. You had seen that and knew what is was before you got that book did you not?

A. No, sir, I did not know what it was. I knew what the old tariff was, but I did not know what the new one was.

92 Q. I understood you to say, did I not, that neither Mr. Powell, the Agent of the L. & N. nor the L. & N. Railroad Co. knew anything of your negotiations with the Keystone Mining & Manufacturing Co. for a contract?

A. Yes, sir, I said they did not know it.

93 Q. In the contract that you have filed dated May 26, 1908, being exhibit No. 13, with A. Waller & Co. is Waller & Co. the firm that you are with and represent?

A. No, sir, I am working for the Henderson Elevator.

60 94 Q. Were you working for the Henderson Elevator Co. July 1, 1908?

A. Yes, sir.

95 Q. The contract with the City of Henderson that you filed dated March 31, 1908, is only to furnish coal at the Water Works as I understand it?

A. Yes, sir, there was another contract with the Electric Light Plant.

96 Q. Is the Henderson City Water Works on a switch connected with any railroad?

A. No, sir.

97 Q. Coal for the Water Works can only be delivered by the River or by wagons, can it not?

A. It can only be delivered by wagons.

Redirect examination by Mr. Jas. W. Clay, attorney for plaintiff:

1 Q. In your cross examination you were asked where the coal was mined that was delivered in cars to the various industries in the City, to which you replied that it came from points on the L. H. & St. L., points on the L. & N. and points on the I. C., and none of it was mined in Henderson, can you state why none of the coal mined in Henderson is delivered in car load lots to any of these plants?

A. The reason that it was not delivered to any of these plants between July 1, 1908 and July 1, 1909, is that the Keystone Mining & Manufacturing Co. was then, and is now, the only plant, the only mine in Henderson that was prepared to load coal in cars and the L. & N. Railroad Co. refused to handle those cars either under the switching rate or freight rate, and that is the only reason that I can give why the home industries are not permitted to buy their coal from home mine—the Railroad Co. refuses to handle the coal.

61 2 Q. You stated that the Keystone Mine shut down about the first of May 1909, have you any knowledge as to why it shut down?

A. No, sir.

3 Q. Is it not a fact that the coal mines generally at that time, with the exception of those who had orders to fill were running only a part of the time?

A. Yes, sir, that is a fact. The coal business covered by part of that period was considered a very poor business.

4 Q. Do you know whether the Keystone Mines would have shut down at that time if the Railroad Co. had switched the cars or performed the switching service under the contract between the Keystone Mining & Manufacturing Co. and the Crescent Coal Co.?

A. I don't believe that they would have closed down, and I don't believe that they would have been compelled to shut down entirely if the Railroad Co. had switched the cars. In fact, I know that they would not have had to close down if the Railroad Co. had handled these cars under the switching rate, as the contract I held with the Keystone Mining & Manufacturing Co. as their sales agent for the City of Henderson for the purpose of selling car load coal would have enabled me to have sold for local consumption in quantities sufficient to keep them running full capacity, or nearly full capacity.

5 Q. In naming the industries that you know of where switching services had been performed from one industry to another, did you not name R. A. Powell. Do you know whether or not the Railroad Co. has performed switching services for R. A. Powell from his place of business in the City of Henderson to industries in the City of Henderson?

A. I stated that on two occasions the Railroad Co. had switched cars from Mr. Powell's place of business to the Electric Light Plant, cars bought from Mr. Powell by the Crescent Coal Co., but I can't call to my mind any other services for Mr. Powell's yard.

62 7 Q. Is Mr. Powell's yard connected with the L. & N. by a switch?

A. Yes, sir, a switch runs from the tracks of the L. & N. into his yard.

8 Q. Whose coal does Mr. Powell handle?

A. Largely the St. Bernard.

9 Q. Where were these two cars of coal when they were shipped by Mr. Powell at the request of the Crescent Coal Co. to the Electric Light Plant?

A. In Mr. Powell's yard.

10 Q. Mr. Yeaman asked you about confirming certain telephone messages by letter, did you in any instance confirm a telephone message by letter where Mr. Powell accepted the telephone order and agreed to comply with those orders?

A. No, sir.

11 Q. Did you always confirm them by letter when he refused to accept those orders?

A. No, sir.

12 Q. At what other times did he refuse to accept orders for cars except in connection with the Keystone Mining & Manufacturing Co.'s contract?

A. At no time that I can call to my mind now.

Recross-examination by Mr. MALCOLM YEAMAN, attorney for defendant:

1 Q. You say if the Keystone Mining & Manufacturing Co. had been able to have had its coal switched to other industrial plants within the limits of the City of Henderson, and thereby to have filled your contract that it would not have had to shut down in your judgment?

A. Yes sir.

– Q. What proportion of the coal that is consumed in the City of Henderson do you think you would have been able to have supplied, had your coal been switched?

63 A. I don't know what proportion of the total consumption I could have supplied, but I do know that I could have sold all the steam coal used in Henderson by industries reached by railroad tracks, or where deliveries could have — made by railroad tracks in our load lots.

3 Q. The coal that was switched from R. A. Powell's yard on the two occasions you have mentioned was brought in from mines in Hopkins County was it not?

A. It was brought in from mines on the Henderson Division, but from just what points I do not know.

4 Q. And it was switched in the cars in which it came from the mine into Mr. Powell's yard at your request, and then shipped in those same cars to your customers?

A. Yes sir.

5 Q. It was brought in on the L. & N. Railroad and switched in the same cars by the L. & N. Railroad?

A. Yes, sir. In order that you may understand thoroughly, I will state that when a car arrives it is allowed free placement under the switching tariff, and if it is rebilled or consigned to any industry in the City of Henderson, then it is subject to *to* the switching tariff governing, which is $2.00 for service and $2.00 for car rental.

STATE OF KENTUCKY,
County of Henderson, set:

I, Mabel McLaughlin, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing deposition of Joe Higdon was taken before me at the time and place mentioned in the caption; that the witness was duly sworn by me before giving said deposition; that the answers were taken by me in shorthand and afterwards transcribed by me; that the plaintiff was present
64 in person, Joe Higdon, and by attorney, Mr. Jas. W. Clay, and the defendant was present by attorney, Mr. Malcolm Yeaman. I do further certify that in filing the exhibits #11 was skipped, making the exhibits Nos. 9, 10, 12, etc.

Given under my hand this 25th day of January, 1912.

MABEL McLAUGHLIN,
Notary Public, Henderson Co., Ky.

My commission expires Jan. 21, 1912.

The exhibit No. 1, referred to in the foregoing deposition is here copied, Viz:

Messrs. Clay & Clay, Agent & Attorneys, Henderson, Ky.

Gentlemen: The Keystone Mining & Manufacuring Co. hereby agrees to sell to you, or the party whom you represent the following grades of coal at the prices, and upon the terms herein below set forth. Contract to be in effect from July 1, 1908, to July 1, 1909, you or your principal to have the privilege of renewing for another year at the expiration of the above period upon the same terms and conditions hereinafter set forth.

We agree to sell under the terms of this contract not less than ten thousand (10,000) tons, nor more than twenty thousand (20,000) tons, shipment to be made as ordered by buyer, but not to exceed two thousand (2,000) tons in any one month.

We agree to furnish all coal ordered up to the time limit above named f. o. b. cars, all coal delivered in cars on the L. & N. R. R. track at our mines, at the following prices to-wit:

65

Lump	$.30 per ton.
Mine Run	.90 per ton.
Lump and Nut mixed	1.10 per ton.
Nut	1.00 per ton.
Pea and Slack	.30 per ton.

The seller agrees to furnish to the buyer all coal ordered in such grades and in such quantities as it may order, provided however that if more than ten per cent of the tonnage ordered in any one month shall be lump coal, then the buyer shall also take and receive all the inferior grades made in screening the lump ordered in excess of such ten per cent; and provided further that if more than twenty-five per cent of the tonnage ordered in any one month shall be pea and slack, then the buyer shall, at the seller's option, be also required to

take and receive the higher grades resulting in making such pea and slack from the mine run; and provided further that the seller shall not be required to deliver, nor the buyer to receive a greater quantity of all grades combined than two thousand (2,000) tons in any one month, nor a greater quantity than twenty thousand (20,000) tons during the year, unless by express consent of both parties made at the time, it is agreed however, that of the total amount of coal ordered during the year not less than fifty per cent shall be mine run.

Payments shall be made for all coal delivered hereunder on or before the 10th day of each month, for all coal delivered during the preceding month.

It is further understood and agreed that this contract is made subject to strikes, unavoidable accidents, and car supply. The seller, however, agrees to use every reasonable effort to obtain the cars in which to load said coal for transportation, and shall only be released from liability on account thereof upon the failure of the railroad company to deliver cars as ordered. Failure to obtain cars at one time shall be no cause for a cancellation of this contract,
66 and shall only release the seller from liability during the period in which cars cannot be obtained, nor shall the buyer be responsible in the event the seller shall be unable to obtain cars in which to load same.

Any modification of any clause of this contract, or of price, made in writing from time to time shall in no way invalidate this contract, and no modification shall take place unless reduced to writing and signed by the parties.

It is distinctly understood that the terms of payment provided for, are of the essence of this contract and a non-compliance therewith gives the seller the privilege of cancellation.

The seller, the Keystone Mining & Manufacturing Co., submits this proposition for your acceptance and agrees that the same shall become binding when the provisions thereof shall have been accepted by you as the agent of the buyer, or by the buyer, provided however, that the guarantee hereinafter set forth shall be signed by some good and solvent person as surety.

Witness the hands of the Keystone Mining & Manufacturing Co., by L. A. Bosserman, this 5, day of April, 1908.

KEYSTONE MINING & MANUFACTURING CO.,
By L. A. BOSSERMAN, *Treas.*

We accept the provisions of the foregoing proposal and agree to order not less than ten thousand (10,000) tons, nor more than twenty thousand (20,000) tons of coal a year, under the terms and conditions as above set forth.

Witness our hands this 14th day of May, 1908.

CRESCENT COAL CO.,
By JO. HIGDON.

The undersigned C. M. Bullitt hereby covenants and agrees to and with the Keystone Mining & Manufacturing Co. that the aforesaid Crescent Coal Co. shall well and truly do and perform the terms and

conditions of the foregoing contract, and shall on or before
66a the 10th day of each month pay to the Keystone Mining &
Manufacturing Co. the full amount due it by said Crescent Coal Co. for all coal delivered to the said Crescent Coal Co. for the preceding month.

Given under my hand this the 14th day of May, 1908.

C. M. BULLITT.

The exhibit No. 2, referred to in the foregoing deposition is here copied, Viz:

This Contract made and entered into this 27th day of May, 1908, by and between the Keystone Mining & Manufacturing Co., a corporation of the City of Henderson, Ky. of the First Part, and Jo. Higdon, of the City of Henderson, Ky., of the Second Part.

Witnesseth: That the first party has and doth hereby appoint the second party as its sales agent for the city of Henderson for the purposes, and subject to the limitations hereinafter set forth, to-wit:

The said Second Party shall have the sole and exclusive right to sell and contract for all coal delivered by the second party in car load lots within the corporate limits of the City of Henderson, Ky. for a period of one year from and after the 1st. day of July, 1908 The First Party agrees and binds itself that it will deliver to no other person, firm or corporation in the City of Henderson, Ky., any coal in car load lots except the Second Party, or if it does so deliver the same it shall be done for and on account of the said Second Party, and he shall receive the difference between the price of the coal delivered as hereinafter to be agreed upon, and the price at which the same was sold.

It is understood that as such sales agent the said Second Party shall have the sole right to take orders for and sell the coal of the first party in car load lots in the City of Henderson, Ky. It is further agreed that all coal, delivered to the second party under this contract, or all coal delivered others under his order shall be
66b paid for by the second party on the basis of the market price on the first of each month during the period covered by this contract. That is to say,—the first and second parties shall, on the first day of each month, or as near thereto as possible, agree on what the market price at that time is, and all coal for the month shall be delivered at the price so agreed upon, and it is understood that the price shall be as low as the price at which the first party could dispose of same elsewhere in car load lots, less freight to the point of shipment.

It is further understood and agreed that the first party does not obligate itself to furnish for or on account of the second party under this contract any given quantity of coal; nor shall it be required to furnish any coal which shall interfere with the supply of coal on the local market in less than car load lots, or by the wagon load. It being the mutual understanding that the first party shall supply its local trade by wagon delivery, shall fill the contract made with the Crescent Coal Co. and signed by said Jo. Higdon, and if it then has

any coal on hand, the said Jo. Higdon shall have the refusal of it, and the first party shall not have any right to ship it elsewhere if the Second Party should desire to use it under this contract in car load lots.

The First Party agrees, however, to fill all orders of the Second Party for car load lots of coal for delivery in the City of Henderson which it can fill without prejudice to its local trade as aforesaid, and without prejudice to the contract with the Crescent Coal Co. above mention.

All coal delivered to or on account of the Second Party under this contract shall be paid for by the second party on or before the 10th day of the month succeeding its delivery.

It is further agreed, and such agreement constitutes a part of the consideration for this contract, that the said Second Party may, should he so desire, renew this contract for another year after
67 it expires, upon the same terms and conditions herein set forth.

Witness the hands of the parties hereto this the 27th day of May, 1908.

KEYSTONE MINING & MFG. CO.,
By L. A. BOSSERMAN, *Treas.*
JO. HIGDON.

The exhibit No. 3, referred to in the foregoing deposition is here copied, viz:—

JULY 2, 1908.

R. W. Powell, Agt., Louisville & Nashville R. R. Co., Henderson, Ky.

DEAR SIR: This is to confirm our telephone conversation of this P. M. wherein I ordered two (2) empty coal cars placed at the mines of the Keystone Mining & Manufacturing Co., to be loaded with coal, and switched to the City Electric Light Plant and A. Waller & Co., under tariff that now governs switching charges at Henderson.

Yours truly,

CRESCENT COAL CO.,
By JO. HIGDON.

Copy.

The exhibit No. 4, referred to in the foregoing deposition is here copied, Viz:—

Louisville & Nashville Railroad Company.

HENDERSON, KY., *July* 3, 1908.

In your reply refer to 1113.

68 Crescent Coal Co., c/o J. D. Higdon, City.

DEAR SIR: I am in receipt of your orders of the 1st and 2nd for two coal cars to be placed at Keystone Mines for switching purposes.

As previously advised: we cannot undertake to furnish the mines with cars for switching coal from their tracks to private sidings or other tracks within Henderson Switching limits, in absence of specific instructions.

We have taken the matter up with our General Freight Office and will advise you as early as possible. I think it would be well for you to take this up with either Capt. Howell, General Freight Agent, Evansville, or Mr. D. M. Goodwyn, G. F. A., Louisville.

Yours truly,

R. W. POWELL, *Agent.*

R. W. P. /x.

The exhibit No. 5 referred to in the foregoing deposition is here copied, Viz:—

HENDERSON, KY., *July* 1, 1908.

Mr. R. W. Powell, Agent, Louisville & Nashville R. R. Co., Henderson, Ky.

DEAR SIR: Confirming our telephone communication of this P. M. wherein I ordered two (2) empty coal cars placed at the mines of the Keystone Mining & Mfg. Co. to be loaded with coal and switched to the Henderson Elevator Co., and A. Wallers & Co., under tariff that now governs switching charges at Henderson.

Yours truly.

CRESCENT COAL CO.,
By JO. HIGDON.

Copy.

69 The exhibit No. 6 referred to in the foregoing deposition is here copied, Viz:—

Louisville & Nashville Railroad Company.

HENDERSON, KY., *July* 13, 1908.

In your reply refer to 1113.

Mr. Jo. Higdon c/o Crescent Coal Co., Henderson, Ky.

DEAR SIR: Referring to your various requests, for cars to be placed on the tracks of the Keystone Mining & Manufacturing Company to be loaded with coal and switched to various industrial plants in the City.

We cannot furnish the Keystone Mining & Manufacturing Company, or any other similar concern, with cars for switching coal to points within the yard limits at Henderson at the switching rate. We are willing to put into effect, when advised of its acceptance, a rate of 50 cts. per ton from the Keystone Mines to Henderson yard deliveries which is the same as the rate from Sebree, Ky., the nearest mine, to Henderson.

Yours truly, R. W. POWELL, *Agent.*

R. W. P./x.

The exhibit No. 7 referred to in the foregoing deposition is here copied, viz:—

Crescent Coal Company.

Steam and Domestic Coal.

Both phones 240.

HENDERSON, KY., *July* 7, '8.

R. W. Powell, Agent, City.

70 DEAR SIR: Confirming our Telephone communication of July 6 & 7th We ordered two coal cars placed at Keystone Mining Co. to be loaded with coal and switched to the Electric Light Plant. Authority the tariff that now controls your switching arrangements at Henderson.

Yours truly,

CRESCENT COAL CO.
JO. HIGDON.

The exhibit No. 8 referred to in the foregoing deposition is here copied, viz:—

HENDERSON, KY., *July* 16, 1908.

Keystone Mining & Manufacturing Co., Crescent Coal Co., City.

GENTLEMEN: Switching Coal Within Limits at Henderson. With reference to furnishing Keystone Mining & Manufacturing Co. with cars for movement of coal from that plant to the various industrial plants within the City of Henderson.

Please understand that we will furnish cars for this movement on basis of 50 cents per ton.

Yours truly, R. W. POWELL, *Agent.*

R. W. P./x.

The exhibit No. 9 referred to in the foregoing deposition is here copied, viz:—

HENDERSON, KY., *August 26th*. 1908.

Mr. R. W. Powell, Agent, Louisville & Nashville Railroad
71 Co., Henderson, Ky.

DEAR SIR: We herewith tender you the sum of four dollars, lawful money of the United States, the amount named in your tariff of rates, for furnishing cars and transporting or switching same from one plant to another, within the switching limits of the City of Henderson, to-wit:—$2.00 to cover switching charge and $2.00 to cover car rental.

You are hereby ordered and instructed to place an empty coal car at the mine of the Keystone Mining & Manufacturing Co., on its switch, there to be loaded with coal and transported or switched and delivered to the milling plant of A. Waller & Co., on its switch. Both of these points are connected with the Louisville & Nashville

RATES, RULES, AND REGULATIONS GOVERNING THE SWITCHING OF CARS

—AT—

37

HENDERSON, KY.

Car Loads Unless Otherwise Specified.

ANY EXCEPTIONS TO THESE RULES WILL BE CLEARLY SHOWN UNDER SPECIFIC HEADING.

1. Rates in this tariff cover the movement of a loaded car one way, and the return of the empty car, or the placing of an empty car, and returning it loaded, unless specified to the contrary herein. If an empty car is ordered for loading, and the service of switching or placing it has been performed, and the car is not loaded, a charge of $2.00 per car will be assessed against the person, firm, or corporation ordering such car.

2. All cars switched from and to switches, tracks, warehouses, and industries covered by this tariff will be subject to the established car service rates, rules, and regulations in effect at Henderson, Ky., as published in L. & N. R. R. Car Service and Storage Tariff G. F. O. 947 (I. C. C. No. A-9804, of March 15, 1908), supplements thereto or re-issues thereof.

3. (a) There is no switching charge to or from locations on tracks of the L. & N. R. R. or L., H. & St. L. R'y within switching limits on freight traffic, car loads, from or destined to Henderson, Ky., via the L. & N. R. R., regardless of whether such traffic is from or destined to competitive or non-competitive points. The L. & N. R. R. handles car load freight within the terminal limits of Henderson, Ky., for the L., H. & St. L. R'y.

(b) When destined to or coming from points on or via the L. & N. R. R. less than car load shipments of freight aggregating 10,000 lbs, or over, will be switched free of charge between depot of the L. & N. R. R. and sidings, warehouses, or industries on the L. & N. R. R. or L., H. & St. L. R'y tracks within switching limits, and such placement or delivery of inbound freight shall constitute delivery of the freight to the consignee.

4. (a) The L. & N. R. R. will absorb the switching charges assessed by the I. C. R. R. at Henderson, Ky., on car load freight traffic from or to competitive points, on which the L. & N. R. R. earns a freight rate or charge other than a switching rate or charge.

(b) The L. & N. R. R. will absorb the switching charges of the I. C. R. R. at Henderson, Ky., on less than car load shipments of freight aggregating 10,000 lbs, or over, when from or destined to competitive points on or via the L. & N. R. R., from or to sidings, warehouses, or industries located on tracks of I. C. R. R.

5. On freight traffic to or from non-competitive points the L. & N. R. R. will not absorb the switching charges of the I. C. R. R., except as specified in Note 6.

6. The L. & N. R. R. will absorb the switching charges of the I. C. R. R. on the following freight traffic from non-competitive points:

Cast iron pipe, from foundries on the L. & N. R. R. or N., C. & St. L. R'y.

from non-competitive points:

Cast iron pipe, from foundries on the L. & N. R. R. or N., C. & St. L. R'y.
Pig iron, from furnaces on the L. & N. R. R. or N., C. & St. L. R'y.
All freight from Pensacola, Fla.

7. (a) Non-competitive Points: By "non-competitive points" it is meant:

Points reached only by rails of the L. & N. R. R., except as provided for in Note 6, and except Paris and McKenzie, Tenn.
Points reached only by rails of railroads having track connection with the L. & N. R. R. only.
Points reached only by rails of the N., C. & St. L. R'y, except as provided for in Note 6, and except Paris and McKenzie, Tenn.
Points reached only by rails of railroads having track connection with the N., C. & St. L. R'y only.

(b) Competitive Points : All points not included in the description of "non-competitive points," but this is not to be considered as authorizing the absorption of switching other than specifically provided for in the foregoing rules.

8. Upon request of the shippers or consignees, cars arriving at Henderson, Ky., via the L. & N. R. R., will be placed upon switches, tracks, or at warehouses or industries reached by and connecting with the tracks of the L. & N. R. R. or L., H. & St. L. R'y, and such placement or delivery shall constitute delivery of the freight to the consignee. When cars are placed upon the usual interchange track with other connecting railroads, such placement or delivery shall constitute delivery of the freight to the consignee so far as it concerns the duty of the L. & N. R. R.

Any subsequent switch movement to a location on L. & N. tracks will be considered a local movement, and will be subject to charges and rules as provided for in Rule 9, except that car rental charge will not be assessed where no part of the shipment has been unloaded nor additional freight has been placed in the car.

9 The L. & N. R. R. does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Ky., Terminals, but where any such service is performed as an accommodation a charge of $2.00 per car plus $2.00 per car for car rental shall be assessed.

10. (a) On cars switched over the Incline Track of the L. & N. R. R. to industries on the L., H. & St. L. or L. & N. R. R. in Henderson, Ky. switching limits, a charge of $2.00 per car for switching service and $1.00 per car for handling from wharf boat to cars will be assessed.

(b) The L. & R. R. will refund the switching charge of $2.00 so assessed upon submittal of evidence of the forwarding of grain or milled products of grain via the L. & N. R. R. to points on or beyond its line.

11. The switching and car rental charge as specified in Note 9, on corn cobs, grain, or milled products of grain from warehouses or elevators on the tracks of the L. & N. R. R. or L., H. & St. L. R'y to mills within the yard limits of Henderson, Ky., for remilling, will be refunded to the shipper upon submittal of evidence of the forwarding of the milled products to points on or via the L. & N. R. R. (Files 45165, 380000, Sub-pad 7.)

12. The Bulk or Team Tracks of the L. & N. R. R. are for the use of the business of that road, and can not be used for loading or unloading shipments of freight received from or delivered to connecting lines at Henderson, Ky.

13. This tariff is subject to the rules and conditions of the Classification under which shipment is handled, when such rules or conditions are not in conflict with those provided in this tariff.

SWITCHING CHARGES AT HENDERSON, KY.—Continued.

SWITCHING CHARGES BETWEEN SWITCHES, TRACKS, WAREHOUSES, AND INDUSTRIES ON THE

LOUISVILLE & NASHVILLE RAILROAD

AND ITS CONNECTION WITH THE ILLINOIS CENTRAL R. R. ON FIFTH STREET AND WITH THE LOUISVILLE, HENDERSON & ST. LOUIS R'Y. (SEE NOTE.)

ON CAR LOAD TRAFFIC EXCEPT AS NOTED IN NOTE.

INDUSTRIES	BUSINESS	LOCATION	L. & N. R. R. Switching charge per car.
Anderson Box & Basket Co.	Baskets	Vine & Alves Sts.	$2 00
City Electric Light Plant	Power House	Fourth & Elm Sts.	2 00
City Mills	Flour Mill	Main St.	2 00
Coquillard Wagon Co	Wagon Mfg	Obryn & Adkisson Sts	2 00
Elliott, William	Tobacco Warehouse	Main St.	2 00
Farnsworth, R. P.	Brick	Belt Line	2 00
Galleher Limited	Tobacco Warehouse	Main St.	2 00
Henderson Brewing Co.	Brewery	Water & Fifth Sts.	2 00
Henderson Cotton Mills	Cotton Goods	Washington St	2 00
Henderson Elevator Co.	Grain and Hay	Foot of Third St.	2 00
Henderson Tobacco Extract Works	Extract and Fertilizer	Audubon St.	2 00
Kraver, Henry	Distillery	Foot of Center St.	2 00
L. & N. River Incline	Transfer Track	Ohio River	2 00
Marshall & Alves	Feed, Sand, etc.	Main & Anderson Sts.	2 00
St. Bernard Coal Co.	Coal	Fourth St.	2 00
R. A. Powell, Agent			
Standard Oil Co.	Coal Oil, etc.	Fourth & Adams Sts.	2 00
Waller, A. & Co	Grain and Hay	Fourth St.	2 00

†See Note 16.

NOTE.—No charge will be made for switching for L., H. & St. L. R'y.

SWITCHING CHARGES BETWEEN SWITCHES, TRACKS, WAREHOUSES, AND INDUSTRIES ON THE

ILLINOIS CENTRAL RAILROAD

ILLINOIS CENTRAL RAILROAD

AND ITS CONNECTION WITH THE LOUISVILLE & NASHVILLE R. R. ON FIFTH STREET.

ON CAR LOAD TRAFFIC.

INDUSTRIES	BUSINESS	LOCATION	ILL. CENT. Switching charge per car from or to connection with L. & N. R. R.
Clore, F. L. & Son	Saw Mill and Lbr. Yard	Fifth St.	$2 00
Marstall Furniture Co	Furniture	Jefferson St.	2 00
Weaverton, Ky	Team Tracks	All Freight except Grain.	2 00
Winstead Distillery Co	Whisky	Foot First St.	2 00

SWITCHING CHARGES BETWEEN SWITCHES, TRACKS, WAREHOUSES, AND INDUSTRIES ON THE

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY

AND ITS CONNECTION WITH THE LOUISVILLE & NASHVILLE R. R.

ON CAR LOAD TRAFFIC.

INDUSTRIES	BUSINESS	LOCATION	L., H. & ST. L. R'Y Switching charge per car.
Conway, S. B.	Coal	Third St.	Note.
Delker, Geo. & Co.	Buggies	Katterjohn St.	
Sandefur, T. A.	Flour	Alzasia & First Sts.	

NOTE.—No charge will be made for switching for L. & N. R. R.

RATES, RULES, AND REGULATIONS GOVERNING SWITCHING OF CARS

—AT—

HOPKINSVILLE, KY.

Car Loads Unless Otherwise Specified.

ANY EXCEPTIONS TO THESE RULES WILL BE CLEARLY SHOWN UNDER SPECIFIC HEADING.

---

1. Rates in this tariff cover the movement of a loaded car one way, and the return of the empty car, or the placing of an empty car, and returning it loaded, unless specified to the contrary herein. If an empty car is ordered for loading, and the service of switching or placing it has been performed, and the car is not loaded, a switching charge of $2.00 per car will be assessed against the person, firm, or corporation ordering such car.

2. All cars switched from and to switches, tracks, warehouses, and industries covered by this tariff will be subject to the established car service rates, rules, and regulations in effect at Hopkinsville, Ky., as published in L. & N. Car Service and Storage Tariff G. F. O. 947 (I. C. C. No. A-9804, of March 15, 1908), supplements thereto or reissues thereof.

3. There are no switching charges to or from locations on tracks of the L. & N. R. R., within switching limits, on freight traffic, car loads, from or destined to Hopkinsville, Ky., via the L. & N. R. R., regardless of whether such traffic is from or destined to competitive or non-competitive points.

4. The L. & N. R. R. has no physical connection with the I. C. R. R. at Hopkinsville, Ky., and therefore no

Railroad, both of them have switches at their plants, and both of them are within the switching limits of the City of Henderson, Ky.

Yours truly,

——— ———.

It is agreed by the parties hereto that pages 130, 131, 133, 237, 257, 263, 353, and 354 of the terminal tariff of the Louisville & Nashville Railroad Company, filed, as an exhibit, with the deposition of Joe Higdon, taken January 12, 1910, and marked "J. H. No. 10," are the only parts of said tariff that are material to the issues in this case, and that they are the only pages of said tariff necessary to be copied into the record on this writ of error to the Supreme Court of the United States.

CHAS. H. MOORMAN.
Attorney for Louisville & Nashville Railroad Company.
CLAY & CLAY,
Attorneys for Joe Higdon.

The above named pages from the Terminal Tariff, referred to in the stipulation follow on the next page:

(Here follow tariff sheets 130, 131, 133, 237, 257, 263, 353, and 354, marked page 72.)

73 The exhibit No 12 referred to in the foregoing deposition is here copied viz:—

HENDERSON, KY., 6/24/9.

Following *is* the names of users of steam coal in Henderson, amounts used annually and source their supplies are now coming from:

(B)	P. P. Johnson & Son	350	tons
(B)	Henderson Brewing Co	3,990	tons
(C)	Henderson Electric Light Plant	5,733	"
(B)	Henderson Water Works	1,000	"
(C)	Henderson Chair Works	480	"
(C)	A. Waller & Co	8,680	"
(C)	Henderson Elevator Co	1,400	"
(B)	Geo. Delker Co	480	"
(B)	Henderson Roller Mills	480	"
(F)	Elemeyer & Klutey B. & T. W'ks	5,000	"
(E)	Worsham Distilling Co	980	"
(B)	Henderson M'n'g & M'f'g Co. Ice Plant	3,000	tons
(A)	Henderson Cotton Mills	10,080	"
(E)	Marstall Furniture Co	1,580	"
(B)	Coquillard Wagon Works	1,920	"
(E)	Henderson Desk Co	1,500	"
(B)	Anderson Box & Basket Co	480	"
(E)	Wm. Elliott Tobacco Factory	480	"
(E)	Jno. H. Hodge Tobacco Factory	200	"
(E)	Thos. Hodge Tobacco Factory	400	"
(E)	Gallaher Limited Tobacco Factory	200	"
(E)	Nosworthy & Argue Tobc. Factory	200	"
(E)	Imperial Tobc. Co. Tobacco Factory	400	"
(C)	A. B. Jarvis Tobacco Factory	480	"
(E)	Eclipse Laundry	480	"
(E)	Peoples Laundry	480	"
	(C) Delker Bros. Buggy Co	480	"
74	(B) Eckert & Wilson Ice Co	1,600	tons
	(C) Hotel Kington	240	"
(C)	Delvin Foundry	240	"
(E)	Henderson Brick Co	2,000	"
	Total	55,013	tons

Source of Coal:

(A) St. Bernard Coal Co.—Direct.
(B) R. A. Powell, Ag't, St. Bernard Coal Co.
(C) Crescent Coal Co., Agent Nebo & Nortonville Coal.
(D) Marshall & Alves, Agent for Reinecke Coal.
(E) Henderson Coal.
(F) Buys from various mines using their brick, about one-half of supply purchased of home mines.

The exhibit No. 13 referred to in the foregoing deposition is here copied, viz:

HENDERSON, KY., *May* 26, 1908.

This agreement, made this the 26th day of May 1908, by and between the Crescent Coal Company, hereinafter know as the seller, and A. Waller & Company, hereinafter known as the buyer.

Witnesseth: The seller agrees to sell and deliver to the buyer their needed supply of coal during a period of one year, beginning July 1st, 1908, estimated at 6,000 (six thousand) tons at the following prices; Pea & Slack 80¢ per ton, mine run $1.35 per ton f. o. b. cars their track.

The seller agrees to use due diligence in supplying the coal as ordered by the buyer, but it is expressly understood that in the event of strikes or delays either at the mine or by the railroad, the seller is not to be held liable under this contract.

The seller agrees that not less than 75% of the coal furnished shall be Pea & Slack. All coal delivered during each month is to be paid for on or before the 9th day of the month following.

75 Witness our hands this the day and date first above written.

CRESCENT COAL COMPANY,
By JO HIGDON.
A. WALLER & COMPANY,
By A. WALLER, *Pres't.*

The exhibit No. 14 referred to in the foregoing deposition is here copied, viz:

This agreement made and entered into this the 31st day of March, 1908, by and between the City of Henderson, Kentucky, of the First Part, and the Crescent Coal Company of the Second Part.

Witnesseth: That whereas the Crescent Coal Company was the lowest and best bidder to furnish coal to the Water Works Commissioners of the City of Henderson, Kentucky, of a grade known on the market as pea and slack for a period of one year at the price of one and 20/100 (1.20) dollars per ton, to be delivered as needed in the bins at the pumping station of the Water Works in the City of Henderson, Kentucky. The weights as per water works scales are to control and govern.

Now, therefore, the said Crescent Coal Company as principal and F. H. Delker, surety, undertake and bind themselves to deliver a grade of coal known on the market as pea and slack for the sum of one and 20/100 ($1.20) dollars per ton as stated above for the period of one year as may be *be* required by the Water Works Commissioners of the City of Henderson.

In the event, however, that the said coal company shall be unable to furnish at the time required pea and slack as above stated, it agrees to furnish a higher grade of coal to keep the plant going at the price of the pea and slack above mentioned.

The said Crescent Coal Company guarantees the coal to be equal in quality to that of any other coal of the same grade, and also

agrees that said coal shall be paid for as per weight of Water
76 Works scales.

In testimony whereof the said party of the Second Part together with its surety have hereunto affixed their hands, this — day of March, 1908.

(Signed in duplicate.)

CRESCENT COAL CO.,
By JO HIGDON.
F. H. DELKER, *Surety.*

The deposition of L. A. Bosserman referred to in the Bill of Exceptions is here copied, viz.:

Henderson Circuit Court.

CRESCENT COAL CO., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

Interrogatories.

Interrogatories to be propounded the witness, L. A. Bosserman, in taking his deposition to be read as evidence on behalf of the plaintiff on the trial of the above styled action now pending in the Henderson (Ky.) Circuit Court.

Direct Interrogatories propounded by Counsel for Plaintiff:

No. 1. Please state your name, residence and occupation?

No. 2. During what period of time, and when if at all, did you reside in the City of Henderson, Ky., and what was your occupation while you lived there? What official position, if any, did you hold with the Keystone Mining & Manufacturing Co.?

No. 3. Are you the same L. A. Bosserman who signed the contract made between the Crescent Coal Co. of Henderson, Ky., and the Keystone Mining & Manufacturing Co., in regard to handling coal in car load lots in the City of Henderson, and which contracts went into effect on the 1st day of July, 1908?

No. 4. Please state whether or not the contracts above mentioned, entered into between the Crescent Coal Co. and the Keystone Mining & Manufacturing Co. were made in good faith and with the
77 intention of being fulfilled and carried out by the Keystone Mining & Manufacturing Co. or whether they were not intended to be carried out?

No. 5. What was the total average daily capacity of the Keystone Mining & Manufacturing Co. from the 1st day of July, 1908, if the mine had been operated to its capacity?

No. 6. Please state whether or not the Keystone Mining & Manufacturing Co. was or was not, ready, willing and able to carry out the terms and conditions of the contracts above mentioned, from and after the 1st day of July, 1908?

No. 7. If anything prevented the carrying out of the contracts mentioned between the Crescent Coal Co. and the Keystone Mining & Manufacturing Co., state what it was?

No. 8. If you shall state that the failure or refusal of the Louisville & Nashville Railroad Co. to furnish cars in which to load coal or ship or switch the coal prevented, or had anything to do with preventing the carrying out of these contracts, state how it prevented it, and how you know the Louisville & Nashville Railroad Company, refused to furnish cars or to switch or transport them in the switching limits of the City of Henderson?

No. 9. What efforts if any, did you make after July 1st, 1908, to get the Louisville & Nashville Railroad Co. to furnish cars to be loaded with coal and switched or transported to points inside the switching limits of the City, or to the industrial plants in said City? With whom were such negotiations carried on, and what was the result of these efforts?

No. 10. If you made any such efforts after July 1st, 1908, were they made for the purpose of filling orders given your company by the Crescent Coal Co. or for other persons?

No. 11. What answer, or reply, if any, did you get to such requests, and from whom did you get such answers or replies?

No. 12. During the time you were connected with the
78 Keystone Mining & Manufacturing Co., what official position did R. W. Powell hold with the Louisville & Nashville Railroad Co.?

No. 13. If the Louisville & Nashville Railroad Co. had furnished the cars to load coal ordered by the Crescent Coal Co., as the orders for such cars were made, and when loaded had transported or switched them to points in the switching limits having switches connected with the L. & N. road, what would have been the result, so far as the contracts between the Crescent Coal Co. and the Keystone Mining & Manufacturing Co. are concerned?

No. 14. In the event it had furnished such cars and transported them would the contract with the Crescent Coal Co. have been carried out, or was there still some other obstacle to the carrying out of such contracts?

No. 15. When, if you know, did the Keystone Mining & Manufacturing Co. shut down, or cease operating its mines in the City of Henderson, Ky.?

No. 16. What, if you know was the cause of its shutting down its mine?

No. 17. State whether or not it would have shut down its mine, or stopped mining coal at its plant, if the Louisville & Nashville Railroad Co. had furnished cars and switched or transported the same, to fill the orders of the Crescent Coal Co. under the contracts mentioned above?

No. 18. State how the refusal of the Louisville & Nashville Railroad Co. to furnish and transport such cars, affected the operation of the mine, or affected its ability to carry out such contracts?

No. 19. What facilities had the Keystone Mining & Manufactur-

ing Co. provided itself with for loading and shipping out coal in car load lots?

No. 20. With what railroad track did your switch connect? Did your switch have any physical connection with the tracks of any railroad company other than the Louisville & Nashville Company?

79 & 80 No. 21. It is admitted by Mr. R. W. Powell, the Local agent of the L. & N. company, that a short time prior to July 1st, 1908, his company switched two cars of coal from the Keystone Mining & Manufacturing Company's plant, one car to the Henderson Elevator Co. and one car to the Electric Light Plant. Will you please state what connection if any, you or the Keystone Company had with the placing of these empty cars on the Keystone switch?

No. 22. Who if you know, ordered, or made requisition on the railroad company for these two cars?

No. 23. State whether or not the Keystone Mining & Manufacturing Co. ordered these two cars from the railroad company under the representation that they were to be loaded with coal for shipment to Owensboro, Ky., or any other place outside of Henderson, Ky.?

No. 24. State whether or not, after the two cars mentioned had been loaded the Keystone Mining & Manufacturing Co. represented to the Louisville & Nashville Railroad Co. that the orders from Owensboro for the coal had been cancelled, and requested on that account in order to free the cars of their loads, that they be switched to the Henderson Elevator or the Electric Light Plant, to be unloaded?

No. 25. State if you know, the purpose for which the two cars named were placed at the Keystone Mine?

No. 26. Who notified the Keystone Mining & Manufacturing Co. of the placement of these two cars? When did you first learn of their placement or proposed placement at the mine? How long after they or either of them were placed before they were loaded? How long did they remain loaded before they were switched out by the railroad company?

No. 27. State whether or not the Louisville & Nashville Railroad Co. before these cars were placed or loaded, knew the purpose for which they were being placed, and what was going to be done

81 with coal after it was loaded into the cars?

No. 28. Please detail all the facts known to you, in connection with the sale by the Keystone Mining & M'f'g Co. of these two cars of coal, who they were sold to, and the whole transaction so far as known to you from the time the sales were made, up to the time the cars were switched out by the railroad company?

Cross-interrogatories:

(1) Why was the contract of which you speak in answer to the 4th interrogatory in chief entered into by means of a proposition from "Messrs. Clay & Clay, Agents and Attorneys" instead of directly with the Crescent Coal Company, or Joe Higdon? Did you not know when the proposition of Clay & Clay was made that they

were acting for the Crescent Coal Company, and that they (Clay & Clay) were not engaged in or interested in the coal business?

(2) When did the Keystone Mining & Manufacturing Company commence to mine coal for sale? When did the mine cease mining coal for sale? How many tons per day, on the average, between the time it commenced mining and the time it ceased, did the mine actually take out? I do not ask as to capacity, but as to actual results. Has it ever resumed operations since it shut down? When did you leave Henderson? Had the mine resumed operations when you left?

(3) How deep is the shaft of the Keystone Mine? Through how many veins of coal does it pass? Which vein was operated while the mine was operated? How far is that vein below the surface? What is the character of the roof of that vein? Is it a good roof or a bad roof?

(4) What quantity of coal, how many tons per day, did the Keystone Mining & Manufacturing Company actually mine and ship to points out of and beyond Henderson while you were with that Company? What quantity did that Company actually mine and sell to consumers within the City of Henderson? How was the coal that was sold to consumers delivered, by wagon or
82 otherwise?

(5) Did the Louisville & Nashville Railroad Company ever decline or fail to furnish cars to and at the Keystone Mine to be loaded with coal for shipment to points outside of and beyond the City of Henderson? If so, when and by whom was the request made to furnish such cars?

(6) State as near as you can, and give your best opinion as to what amount of capital was invested in the plant of the Keystone Mining & Manufacturing Company prior to the making of the contract with Higdon or Crescent Coal Co. of July 1st, 1908, and what amount of capital was put into said plant after making said contract? Was the shaft sunk and the mine in operation at the time that contract was made?

(7) With whom did the Keystone Mining & Manufacturing Company have contracts for coal, besides Higdon or the Crescent Coal Company? Who else and in what quantity, did the Keystone Company ever sell or contract any coal to in car load lots?

(8) Did the Keystone Mining & Manufacturing Company cease operations because the Crescent Coal Company or Higdon could not or did not carry out the contract effective July 1, 1908? or because the Louisville & Nashville Railroad Company failed to furnish cars and to transport the coal of the Keystone Company to the different industrial plants within the City of Henderson?

(9) Was the Keystone Mining & Manufacturing Company's enterprise entered upon the shaft sunk and its capital invested with the view of having the coal it contemplated mining hauled in cars, instead of wagons and carts, from its mine to the different industrial plants in the City of Henderson having connection by switches with the track of the Louisville & Nashville Railroad Company?

And did the Keystone Company cease operations because the L. & N. R. R. Company would not furnish cars for such service?

83 (10) Is it not a fact that before the Keystone Mining & Manufacturing Company had commenced to sink its shaft, Mr. Nicholson then in charge of its affairs, went to the traffic manager, or other official of the Louisville & Nashville Railroad Company and asked, in substance, what arrangements could be made to have the L. & N. R. R. Company to transport its coal to the industrial plants in the City of Henderson, and that he was told, in substance, that no such arrangement could be made, that the L. & N. R. R. Company did not engage in transporting coal or other property from one point in a City to another point in the same City?

It is agreed between the parties that the deposition of L. A. Bosserman may be taken upon the i-terrogatories and cross interrogatories, hereto attached; that said interrogatories and cross interrogatories may be sent direct to the said L. A. Bosserman and his deposition given thereon before any Notary Public that said deposition may be taken in long hand, or in shorthand and transcribed, provided that after being transcribed the same shall be signed by the witness. Said deposition shall then be certified and forwarded in the usual way. Notice and commission to take are waived. All objections to interrogatories and answers thereto are reserved.

This July 28, 1910.

CLAY & CLAY,
Attorneys for Plaintiff.
YEAMAN & YEAMAN,
Attorneys for Defendant.

CAMBRIA COUNTY, *ss:*

The Commonwealth of Pennsylvania to L. A. Bosserman, Greeting:

This is to command you, that setting aside all manner of business and excuses whatsoever, you be and appear in your proper person, before H. H. Myers, Notary Public, and Commissioner to take testimony at his office in the Borough of Ebensburg, on the

84 Thirtieth day of August, A. D. 1910, at 7 o'clock, P. M. to testify to all and singular those things which you shall know concerning the case of Crescent Coal Company vs. Louisville & Nashville Railroad Company in the Henderson (Ky.) Circuit Court.

And this you are not to omit under the penalty that may ensue.

Witness the hand and seal of the said Notary this 29th day of August, A. D. 1910.

[SEAL.]

H. H. MYERS,
Notary Public.

The foregoing bears on the reverse the following:

CRESCENT COAL CO.
vs.
LOUISVILLE & NASHVILLE RAILROAD CO.

Subpœna.

I hereby certify that I served the within subpœna on the within named L. A. Bosserman this 29th Day of August, 1910.

R. D. EVANS, *Constable.*

Costs, Service & Mileage $3.00.

The Deposition of L. A. Bosserman, Taken Before Me, at My Office, in the Borough of Ebensburg, County of Cambria and State of Pennsylvania, on the Thirtieth Day of August, 1910, upon the Interrogatories and Cross-interrogatories Hereto Attached, to be Read as Evidence on Behalf of the Plaintiff on the Trial of a Case Now Pending in the Henderson (Kentucky) Circuit Court, Wherein the Crescent Coal Co. is Plaintiff and The Louisville & Nashville Railroad Company is Defendant.

In answer to first direct interrogatory, the witness answered L. A. Bosserman. Expedit, Pa.: Book-keeper.

In answer to the second direct interrogatory, the witness answered:

85 I resided in Henderson, Kentucky, from Oct. 1, 1907 to Feb'y 1, 1909. I was Treasurer of the Keystone Mining & Manufacturing Co.

In answer to the third direct interrogatory, the witness answered: I am.

In answer to the fourth direct interrogatory the witness answered:

They were made in good faith with the intention of being carried out.

In answer to the fifth direct interrogatory the witness answered: Five hundred tons?

In answer to the sixth direct interrogatory, the witness answered: They were ready, willing and able.

In answer to the seventh direct interrogatory the witness answered:

The failure to procure cars on which to load the coal.

In answer to the eighth direct interrogatory, the witness answered:

The railroad Company refused verbally and by letter under date of August 10, 1908, to perform this service.

In answer to the ninth direct interrogatory, the witness answered:

I made efforts verbally and also gave orders by letter to the *to the* local agent. All of these were met with an absolute refusal.

In answer to the tenth direct interrogatory, the witness answered:

They were made for the purpose of filling orders for the Crescent Coal Co., and for others.

In answer to the eleventh direct interrogatory, the witness answered:

86 I got replies from R. W. Powell, local agent for the L. & N., that they would not perform that service.

In answer to the twelfth direct interrogatory, the witness answered:

Local freight agent.

In answer to the thirteenth direct interrogatory, the witness answered:

They would have been carried out.

In answer to the fourteenth direct interrogatory the witness answered:

There was nothing else preventing the carrying out of the contracts.

In answer to the fifteenth direct interrogatory the witness answered:

About May 1, 1909.

In answer to the sixteenth direct interrogatory, the witness answered:

It was done by action of the Board of Directors after my leaving the service of the Company.

In answer to the seventeenth direct interrogatory the witness answered:

It certainly wouldn't have.

In answer to the eighteenth direct interrogatory the witness answered:

It made them unable to handle their product.

In answer to the nineteenth direct interrogatory the witness answered:

They had a side-track, having connection with the main line of the L. & N. Railroad Co.

In answer to the twentieth direct interrogatory the witness answered:

We had a connection only with the Louisville & Nashville Railroad Company's tracks.

87 In answer to the twenty-first direct interrogatory the witness answered:

We made requisition for them.

In answer to the twenty-second direct interrogatory the witness answered:

We did.

In answer to the twenty-third direct interrogatory, the witness answered:

They did not.

In answer to the twenty-fourth direct interrogatory the witness answered:

They did not.

In answer to the twenty-fifth direct interrogatory the witness answered:

To be loaded with coal and to be shipped to the industrial plants named.

In answer to the twenty-sixth direct interrogatory the witness answered:

I made requisition. They were placed in a few days. Loaded at once and switched out by the Railroad Company within a few days.

In answer to the twenty-seventh direct interrogatory the witness answered:

I am unable to state.

In answer to the twenty-eighth direct interrogatory the witness answered:

I have already answered this in the foregoing answers to the foregoing interrogatories.

In answer to the first cross-interrogatory, the witness answered:

I knew Clay & Clay as agents and attorneys and not until we met to sign contracts already submitted did I know, whom their client was.

In answer to the second cross-interrogatory the witness answered:

88 In the early part of 1906 and ceased mining coal in April 1909. They mined between fifty and two hundred tons per day being all that they could dispose of. It has not resumed operations since shutting down. I left Henderson, Ky., in Feb'y 1909. It had not yet ceased operation when I left.

In answer to the third cross-interrogatory, the witness answered:

The shaft is four hundred and fifty-seven feet deep. It passes through two veins of coal. Both No. 9 and No. 11 veins were operated. The former being one hundred and fifty-one feet; the latter four hundred fifty-seven feet from the surface. The roof in both veins is of slate and of fair condition.

In answer to the fourth cross-interrogatory, the witness answered:

The Keystone Mining and Manufacturing Co., shipped very little coal to points beyond Henderson. Possibly five cars in one month. They sold from fifty to one hundred and seventy-five tons per day within the City. This was delivered by wagon.

In answer to the fifth cross-interrogatory, the witness answered:

The Louisville & Nashville Railroad Company declined to furnish cars in which to load and ship our product by letter under date of August 10, 1909. Requests for cars being made by me.

In answer to the sixth cross-interrogatory, the witness answered:

The Keystone Mining & Manufacturing Co., invested about Two hundred and twenty thousand Dollars, prior to July 1, 1908 and about twenty thousand Dollars after that date. The shaft was sunk and mine in operation when contract with Crescent Coal Co., was made.

In answer to the seventh cross-interrogatory the witness answered:

89 Only with a few local consumers. We sold coal to the Diamond Coal Mining Co., and to a Distilling Co., in Owensboro, but had no contracts for the same.

In answer to the eighth cross-interrogatory the witness answered:

Both of these questions had considerable bearing on the shutting down of the Keystone Company's Mines.

In answer to the ninth cross-interrogatory, the witness answered: I understand they contemplated having their coal hauled in cars. This had much to do with the Keystone Co., shutting down its mines.

In answer to the tenth cross-interrogatory, the witness answered: I know of no arrangements made between Mr. Nicholson and any of the officials of the Louisville & Nashville Railroad Co.

L. A. BOSSERMAN.

STATE OF PENNSYLVANIA,
County of Cambria, ss:

I, H. H. Myers, a Notary Public in and for the State and County aforesaid do hereby certify that the foregoing deposition of L. A. Bosserman was taken before me, in my County, upon the interrogatories and cross-interrogatories hereto attached; that the questions were propounded by me to the witness, and the answers thereto made were typewritten by me, read by the witness and he thereupon signed said deposition; I further certify that before giving said deposition the witness was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, and I further certify that neither the plaintiff nor the defendant were present at the taking of said deposition either in person or by attorney.

90 Said deposition was taken at my office on the Thirtieth day of August A. D. 1910.

Given under my hand and seal of office, this 30th day of August A. D. 1910.

[SEAL.]

H. H. MYERS,
Notary Public, Cambria County, Penna.

My Commission expires Jany. 21st 1911.

Costs:

Constable R. D. Evans. Serving subpœna and mileage....	$3.00
H. H. Myers, Notary Public. Taking testimony.....	5.00
Postage (including registering)	.16
Total.....	$8.16

H. H. MYERS, *N. P.*

The deposition of R. W. Powell filed herein on May 9th 1910 is here copied, viz:—

Deposition of R. W. Powell, Taken Pursuant to Adjournment, at the Same Place, on the 7th Day of May, 1910, to be Used for the Same Purpose.

Examined by Mr. M. YEAMAN for Def't:

Q. Where do you reside, how long have you resided there, what is your occupation and how long have you been so engaged?

A. Reside in Henderson, Ky., have been living in Henderson some 20 years and my occupation is local Freight Agent for the Louisville & Nashville Railroad Company. I have been employed in that position about seven years.

Q. State if you can what manufactories and other plants in the City of Henderson had in the years 1908 and 1909 physical connection by switch or otherwise with the tracks of the Louisville & Nashville Railroad Company and other railroads that enter the City of Henderson?

91 A. The following plants and industries during the years 1908 and 1909 were connected with the Louisville & Nashville Railroad Company's tracks by track connection: Henderson Brewing Company, Henderson Electric Light Plant, R. A. Powell Coal Yard, Standard Oil Co., F. W. Cook Cold Storage Building, A. Waller & Company's Mill and Elevator, Henderson Elevator, Henderson Cotton Mill, Marstall Furniture Company, Coquillard Wagon Works, Anderson Box & Basket Co., Marshall & Alves Coal yard, The city Mills, Henderson Tobacco Extract Works, Wm. Elliott's Tobacco Factory, Henderson Traction Company's power house, and Worsham Distilling Co. or Kraver's Distillery.

The following plants have joint track connection with the L. & N. and I. C. Railroad Companies. Marstall Furniture Company, Coquillard Wagon Works, Henderson Cotton Mill, A. Waller & Co., Henderson Elevator Company, Henderson Chair Factory was located exclusively on the I. C. tracks.

Q. Did you have knowledge in the years of 1908 and 1909 of the switching done by the L. & N. Railroad Company within the switching of terminal limits of the City of Henderson?

A. Yes sir. I had full knowledge of all switching performed in the Henderson switching terminals during those two years. It is a part of my duty to manage the yard.

Q. Can you file as a part of your deposition a statement of such switching showing the consignor, the consignee, from what point to what point the switching was done, the name or the initial of the road to which the car belonged that was switched, the number of the car, the contents of the car and the switching charges that were made for such switching and the date upon which the switching was done; if so, please file such statement?

A. Yes, I file a statement of all cars handled in local switch move covering the period from January 1906 to April 30, 1910, 92 inclusive and file same herewith, marked with my initials for identification.

Q. When coal is brought into Henderson over the L. & N. Railroad and it is left at the plant or other consumer's places of business is that done as a switching service or is it so delivered at the place of the consumer as its destination?

A. Cars arriving at Henderson and set off in the yards are not at their destination until delivered to the plants to which they are consigned. The final delivery is by yard engines.

Q. Is any switching or other charge made for placing it at its final destination; that is at the consumer's place?

A. No sir; there is no other charge made, the rate to Henderson covers the rate to consignee's plant.

Cross-examined by Jas. F. Clay for PTF:

Q. In examining your statement I see under the head of remarks, of the account your file in answer to Mr. Yeaman's question "$2 per car, $2 per car" &c., what is that?

A. That is the charge for switching a car from one local point to another, or from the points shown on that statement as the origin of the shipment to the point to which it was shipped; that is strictly local movement.

Q. And the amounts mentioned in that column under the head of remarks are the amounts paid by the consignees to the railroad Company as such switching charges?

A. Yes sir.

STATE OF KENTUCKY,
County of Henderson:

I, A. Fitz Gibbon, a Notary Public in and for the County and State aforesaid do certify that the foregoing depositions of J. L. Nicholson, H. J. McAvoy, Henry Kraver, Paul J. Mairs, William Elliott, L. A. Kuester, Sam J. Alves and R. W. Powell were taken before me pursuant to notice and adjournment on the 5th
93 and 7th of May 1910 at the law office of Yeaman & Yeaman in the City of Henderson, Kentucky, that before giving said depositions the witnesses were each duly sworn by me that the testimony they should give would be the truth, the whole truth and nothing but the truth; that the testimony was written by me in shorthand and afterwards transcribed and the signature thereto waived by the parties; I further certify that at the taking of said depositions neither party was present in person, that plaintiff was present by Attorney Mr Jas. F. Clay and defendant was present by Attorney M. Yeaman.

Given under my hand this 9th day of May 1910.

A. FITZ GIBBON.
Notary Public, Henderson County, Ky.

My commission expires 1/10/14.

The following deposition of C. B. Congdon referred to in the Bill of Exceptions filed Jan. 18th. 1910. is here copied, viz:

Henderson Circuit Court.

JOE HIGDON, Doing Business under the Firm Name and Style of Crescent Coal Co., Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Deposition of C. R. Compton, Taken at the Louisville & Nashville Railroad Building, Ninth and Broadway, Louisville, Kentucky, by Agreement, to be Read as Evidence on Behalf of the Defendant on the Trial of the Above-styled Case, said Deposition Being Taken on the 13th Day of January, 1910.

C. R. COMPTON, being duly sworn, was examined by Mr. Moorman, and testified as follows:

1. Please state your name and occupation?

A. C. R. Compton; Traffic Manager Louisville & Nashville Railroad Company; official address, Louisville, Kentucky.

84 2. How long have you been connected with the Louisville & Nashville Railroad Company, as its Traffic Manager, and in what other capacities have you been connected with said Company?

A. I have been Traffic Manager of the Louisville & Nashville Railroad Company since the 1st of April 1903. I have been connected with the Louisville & Nashville Railroad Company since the 1st of August 1871 in various capacities, such as clerkships, local freight agencies, commercial agencies, general agencies; general freight agent, and Traffic Manager.

3. As Traffic Manager what are your duties?

A. Under the organization of the Louisville & Nashville Railroad Company the Traffic Manager has charge of all kinds of traffic incident to transportation by rail, freight, passengers, express and mail, &c. It is my duty as Traffic Manager to supervise the various kinds of traffic, to make rates for the transportation thereon, and to deal with connecting lines for the interchange of business; subject however to the approval of its managing officers.

4. Among your duties as Traffic Manager, is it your duty to determine as to what commodities the Louisville & Nashville Railroad Company will haul, and between what points it will engage in the business of a common carrier?

A. It is.

5. Are you familiar with the tracks, switches and railroad situation in the city of Henderson, Kentucky?

A. I am.

6. Do you know where the plant and mine of the Keystone Mining & Manufacturing Company are located with reference to the yards and tracks of the Louisville & Nashville Railroad Company at Henderson?

A. I do. The coal mines of the Keystone Mining & Manufacturing Company are located in the southern outskirts of the City of Henderson, adjacent to the main line of the Henderson Division of

the Louisville & Nashville Railroad Company, just north of
95 the yard board which indicates the yard limits of the city.

7. Is the mine of the Keystone Mining & Manufacturing Company within the switching limits of the city of Henderson?

A. It is.

8. Is there any station located at that plant?

A. No, sir.

9. Explain the difference between a transportation service and a switching service?

A. I will undertake to describe a transportation service first. A transportation service is a service which is performed by a railroad company in the transportation of property between two cities—and by this I do not mean between points within the city—upon which is charged a tariff of rates for the service performed. To illustrate, a transportation service is a service performed by the railroad in the transportation of property between points like Henderson, Kentucky and Nashville, Tennessee. A switching service is an auxiliary to the transportation service, that is to say that if property was transported from Henderson, Kentucky, to Nashville, Tennessee, and the property to be transported was from an industry having switching connections, the movement of the car from the industry to the yards where the trains are made up is a switching movement or auxiliary to the conduct of the traffic between the two cities. Likewise switching at Nashville, Tennessee, of property in the car to a consignee who might be located upon a private side-track, that would also be an auxiliary to the transportation service. That is switching. If a shipment should reach Henderson, Kentucky, from a point like Nashville, Tennessee, consigned to an individual having an industry on a private track, the service from Nashville to Henderson would be the transportation service, and the auxiliary or switching service would be from the yards to the industry. The movement of the car from the yards to the industry is switching.

10. Does a switching service ever exist except as an aux-
96 iliary to a transportation service?

A. No sir.

11. Does a switching service embrace in any sense the switching of cars between industrial plants in yard terminals?

A. No, sir.

12. Does the Louisville & Nashville Railroad Company engage as a common carrier in switching cars from one industrial plant to another industrial plant within the city of Henderson, or within any yard terminals?

A. It does not.

13. Does the Louisville & Nashville Railroad Company hold itself out as a common carrier to do switching from one industrial plant to another industrial plant within the same city?

A. It does not.

14. Does it hold itself out as a common carrier to do switching from one industrial plant to another industrial plant within the same station limits at any point on its line?

A. No, sir.

15. Has the Louisville & Nashville Railroad Company at any time performed the service of switching or transporting cars for the Keystone Mining & Manufacturing Company from its plant or Mine at Henderson to another industrial plant in the city of Henderson?

A. The movement of a car between any two points within the city limits of Henderson would not be switching. Switching is an auciliary movement incident to transportation. The Louisville & Nashville Railroad Company did move two carloads of coal from the Keystone Mining & Manufacturing Company's track to an industry located on the Louisville & Nashville Railroad in Henderson having a switch connection. The movement or the transportation of the cars was done as a matter of accommodation under these circumstances: The Keystone Mining and Manufacturing Company had two cars loaded with coal at their tipples for shipment to des-
97 tination beyond the city of Henderson, where transportation service would be rendered. It being shown that the orders were cancelled, the transportation movement could not occur until a sale might be made to some other destination, and in order to relieve the cars of their loads, and prevent delay, it did as a matter of accommodation, move the cars under those circumstances from the Keystone Mining & Manufacturing Company to the industrial plant at Henderson.

16. Is there a tariff provision promulgated by the Louisville & Nashville Railroad Company by which the movement that you have spoken of is authorized?

A. There is.

17. Please file with your deposition a copy of that rule, or file the tariff embracing the rule.

A. I will file the same as Exhibit A.

18. Please explain the purpose of that rule, and its practical application to the business of the Louisville & Nashville Railroad Company in the city of Henderson?

A. The rule referred to is set forth fully in paragraph 9 of the Tariff filed as Exhibit A. And it specifically says that the Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses or industries at Henderson, Kentucky.

The Louisville & Nashville Railroad Company does not hold itself out as a common carrier, or in fact under any condition to move this business, except as an accommodation, or to render assistance in cases of distress or pressing necessity, as described in the movement of the two carloads of coal from the Keystone Mining & Manufacturing Company to the industrial plant in Henderson.

19. Has the Louisville & Nashville Railroad Company performed the service of transferring wheat, corn, &c. from the wharfboat at Henderson, and from the inclined track there, to various industrial plants in Henderson, and does it now perform that service
98 under certain circumstances?

—. The Louisville & Nashville RailroadCompany has transferred by car from the wharfboat at the foot of the incline, from the bank of the Ohio River, grain, such as corn, wheat and oats to the

elevators and mills located on its tracks at Henderson, and it is now doing so.

20. Under what circumstances has it and does it now transfer grain, in carloads, from the wharf to the elevators in the City of Henderson?

A. Henderson, Kentucky, like other Ohio River rail crossings, such as Paducah, Owensboro, Louisville, Cincinnati &c., is engaged in the business of handling grain and grain products to the vast territory south of the Ohio and the Potomac Rivers and east of the Mississippi River. The grain originating on the Ohio River necessarily must be brought to Henderson by boat and transferred to the elevators and mills whereat it can be properly treated in order to meet the commercial necessities of grading, &c. and convert the same into mill products. The transfer from the wharfboat by cars to said industries is a necessary auxiliary to the conduct of its business.

The business moved by car from the wharfboat to the industries is further transported beyond Henderson, Kentucky, to the destination at which the property is sold or consumed. It is what is usually term- as re-shipping or milling in transit.

21. Is the movement of the corn in carload lots from the wharfboat to the elevators a transfer service and auxiliary to transportation service performed in reshipping the grain from the elevator.

A. Yes, sir.

22. If the grain is reshipped from the elevator, do the rate and charges on such shipment include the service of transferring the grain from the wharfboat to the elevator?

A. It does.

99 23. The service of transferring the grain from the wharfboat to the elevator companies is therefore a part of the transportation service in reshipping the grain?

A. Yes, sir; from its origin to its destination beyond Henderson.

24. When the Louisville & Nashville Railroad Company performs a switching service which is auxiliary to the transportation service by another line, does it make for that service a switching charge?

A. It does.

25. What is a blanket rate, Mr. Compton?

A. A blanket rate so-called, can better be explained by illustration than by definition. There are coal mines located on the Henderson Division of the Louisville & Nashville Railroad Company, south of Henderson and north of Guthrie, Kentucky, varying in distance from Henderson, the extreme distance we will say is 60 miles, and the minimum distance we will say is 20 miles. The rates on the coal from this group of mines to Henderson is uniformly the same, and when rates are made for varying distances the same, they are usually called blanket rates.

26. What section of country in the vicinity of Henderson is covered by blanket rates on coal, from that section to Henderson and to other points?

A. The coal producing points on the Henderson Division and the Morganfield Branch of the Louisville & Nashville Railroad Com-

pany are as follows: Sebree, Providence, Madisonville, Earlington, Barnsley, Mortons, Nortonville, Mannington, Empire and Nebo. They vary in distance from Henderson, that is to say they are not all the same distance from Henderson. The rates from these points to Henderson are the same, and they are blanket rates.

From these same points to points south, to a point say like Nashville, Tennessee, the distances are not uniform, yet the rate from all the points to Nashville are uniform, and they are blanket rates.

100 27. Could the movement of coal in car-load lots from the Keystone Mining & Manufacturing Company's mine to points in Henderson, be considered under any circumstances a switching service?

A. No, sir.

28. If such service were performed, what kind of service would it necessarily be.

A. It would be a transportation service in the same sense that a transportation service is a transportation service when moved from one town to another town.

29. If the services were performed, what would be a reasonable rate?

A. If the Railroad Company was required to perform a transportation service between two points within the City of Henderson, it should not be done for a less charge than the charge of transporting coal from the nearest mine to Henderson, on the Henderson Division.

The rates on coal from the Henderson Division mines to Henderson are very low. Those rates were made in competition with the Ohio River, in order to enable the producers of coal on the Henderson Division to place their coal in the market at competitive prices. The necessity for the fifty cent rate showed itself. It was right and proper that the mines, regardless of distance in this case, should have the same rate, in order that they might compete with each other, and with the coal brought to Henderson via the Ohio River and from adjacent mines on other lines. The service to be rendered in the conduct of the Keystone Mining & Manufacturing Company's movement will be quite as expensive to the carrier as that incident to moving coal from the nearby mines to Henderson on the Henderson Division.

In conducting the transportation of coal from the nearby mines on the Henderson Division to Henderson, in the freight service, the cars are dropped at the mine by the train going south, and picked up and brought north by the train coming north. If this service was performed for the Keystone Mining Company it

101 would necessitate an extra run of an engine from the yards to the coal mine with empty cars returning, and then making an extra trip to the mines to bring the loaded cars back to the yards. Therefore this expense would be in excess of the expense in conducting the business from the mines located on the main line of the Henderson Division.

30. Has this company ever performed the service of transferring

cars of coal from a coal mine located in or near the city of Mt. Vernon, Illinois, to industrial plants in Mt. Vernon, and if so, under what circumstances?

A. The Louisville & Nashville Railroad Company did move a few car loads of coal as an accommodation to the Mt. Vernon Car Company. The Mt. Vernon Car Company builds railroad equipment. This business was moved from the mines to the plant named, in their cars, as an accommodation. The Louisville & Nashville Railroad Company also moved two or three cars of coal from the mines to the Water Works at Mt. Vernon. The Water Works at Mt. Vernon supplies the city with water. It is a municipal institution, and we deemed it fair that we move this coal for the Water Works Company on that account, and no other.

31. Do you know when the Keystone Mining & Manufacturing Company's mine was first opened?

A. No, sir.

32. When or about when were you first apprised of the intention of the Keystone Mining & Manufacturing Company to open the mine it is now operating and now has in Henderson?

A. On January 31, 1905 Mr. J. L. Nicholson, who was then connected with the Henderson Mining & Manufacturing Company at Henderson, Kentucky, came to see me. He is the party who developed the coal mine at Henderson, which is now called the Keystone Mining & Manufacturing Company. He indicated a desire to develop the mine, and asked about the rates that we would apply thereon, and also asked about the building of sidetracks, &c. He gave me its location and physical conditions as to location,

102 and asked me if we would move property from that location by car to points in Henderson. I told him we could not do that, as we were not engaged in moving property between points within a town or city itself; that I could say that it would be a discrimination against other people; that it would establish a precedent that had never been established; that the device which we furnished would only be used when the cost to him was less than the cost of using his device, a mule and cart. He admitted that that was a fact. I said if we should move coal for him, that he would be getting a rate of approximately 10 cents per ton, and that that would be less than he could move it for by team. That referred to the movement of business to the industries. I said to him that he would not be likely to use the railroad for transportation service unless the service cost him less than the service by team; that he would not use the service if the coal used at Henderson was for stores, hotels and residences, for the reason that the coal would be loaded in the car, moved to a team track, and there reloaded into carts, and from the car hauled to the required place of consumption; that the direct movement from the mine by team to the consuming point not located on the railroad would be less cost to him in the movement of the coal than if moved by cart and team. This he admitted and stated emphatically that he only desired the transportation service performed when the coal was to be used by an industry having track connection.

33. Does the Louisville & Nashville Railroad Company compete at Henderson or at any other point with drays and wagons in the delivery of coal and commodities and livestock between industrial plants?

A. No, sir, it does not.

33. Was the conversation which you have referred to, with Mr. Nicholson, prior to the putting in of the sidetrack for the Keystone Mining & Manufacturing Company?

A. It was.

103 34. Was it prior to the time that his mine was opened?

A. It was.

35. Were Mr. Nicholson and his Company at that time given to understand that the Louisville & Nashville Railroad Company would not engage in the service of transferring coal from the mine of the Keystone Mining & Manufacturing Company to industrial plants or other points located within the Henderson Terminal?

A. They were; and in most positive terms.

36. Freight Agent Powell of Henderson offered on July 3, 1908, to make the Keystone Mining & Manufacturing Company a rate of fifty cents per ton for transferring the coal from the mine of that company to industrial plants in the city of Henderson. Will you please state whether or not such offer was authorized by you.

A. If Mr. Powell, the Agent at Henderson, Kentucky, offered to perform such a service for fifty cents per ton he did so without any authority whatever. He had no authority to say that we would move or transfer the property at any rate whatever, and he had no authority whatever to make any suggestion concerning the rate itself.

37. Thereafter, probably about August 10, 1908 he withdrew his offer, and advised the Keystone Mining & Manufacturing Company that his instructions from the General Freight Agent at Evansville were that the Louisville & Nashville Railroad Company would not under any circumstances perform the service of switching cars of coal from the mine of the Keystone Mining & Manufacturing Company to industrial plants in the city of Henderson. Can you state why this information was given to the Keystone Mining & Manufacturing Company at that time by Mr. Powell?

A. My attention was called to the alleged quotation of a rate or promise to move the property from the Keystone Mining & Manufacturing Company's plant to industries in Henderson, and immediately upon receipt of this information I called the attention of Lee Howell, General Freight Agent at Evansville, to it, and di-

104 rected him to have the matter investigated, and determine if it was possible that the Agent at Henderson had offered to perform such service.

The authority for such arrangements is not delegated to the Agent at Henderson, but applies entirely to the Traffic Department, with which the Agent at Henderson has no connection.

C. B. COMPTON.

STATE OF KENTUCKY,
County of Jefferson, set:

I, Elizabeth Harrison, a Notary Public within and for the County and State aforesaid, do certify that the foregoing desposition of C. B. Compton was taken before me, by agreement, at the time and place, and for the purpose in the caption stated; that the witness was first duly sworn to tell the truth, the whole truth, and nothing but the truth; that said deposition was taken by me in shorthand, and the foregoing is a true and complete transcript of my notes; and that said deposition was read over to and subscribed by the witness in my presence; that the plaintiff was not represented at the taking of said deposition, and the defendant was represented by Mr. C. H. Moorman.

Witness my hand this 15th day of January, 1910. My commission expires January 10th, 1914.

ELIZABETH HARRISON,
Notary Public, Jefferson County, Ky.

The Exhibit mentioned in the foregoing deposition of C. B. Compton is here copied, Viz:

Rates, Rules, and Regulations Governing the Switching of Cars at Henderson, Ky.

Car Loads Unless Otherwise Specified.

Any Exceptions to These Rules Will be Clearly Shown under Specific Heading.

105 1. Rates in this tariff cover the movement of a loaded car one way, and the return of the empty car, or the placing of an empty car, and returning it loaded, unless specified to the contrary herein. If an empty car is ordered for loading, and the service of switching or placing it has been performed, and the car is not loaded, a charge of $2.00 per car will be assessed against the person, firm, or corporation ordering such car.

2. All cars switched from and to switches, tracks, warehouses, and industries covered by this tariff will be subject to the established car service rates, rules, and regulations in effect at Henderson, Ky., as published in L. & N. R. R. Car Service and Storage Tariff G. F. O. 947 (I. C. C. No. A-9804, of March 15, 1908), supplements thereto or reissues thereof.

3. (*a*) There is no switching charge to or from locations on tracks of the L. & N. R. R. or L. H. & St. L. Ry. within switching limits on freight traffic, car loads, from or destined to Henderson, Ky., via the L. & N. R. R., regardless of whether such traffic is from or destined to competitive or non-competitive points. The L. & N. R. R. handles car load freight within the terminal limits of Henderson, Ky., for the L. H. & St. L. Ry.

(*b*) When destined to or coming from points on or via the L. & N. R. R. less than car load shipments of freight aggregating 10,000 lbs., or over, will be switched free of charge between depot of the L. & N. R. R. and sidings, warehouses, or industries on the L. &

N. R. R. or L. H. & St. L. Ry. tracks within switching limits, and such placement or delivery of inbound freight shall constitute delivery of the freight to the consignee. This rule does not apply to cars containing less car load shipments of exceptionally heavy or bulky nature, weighing over 2,000 lbs. each, which for our own convenience we might desire to switch, as on such articles no minimum loading will be required.

4. (*a*) The L. & N. R. R. will absorb the switching charges
106 assessed by the I. C. R. R. at Henderson, Ky., on car load freight traffic from or to competitive points, on which the L. & N. R. R. earns a freight rate or charge other than a switching rate or charge (see Rule 14).

(*b*) The L. & N. R. R. will absorb the switching charges of the I. C. R. R. at Henderson, Ky., on less than car load shipments of freight aggregating 10,000 lbs. or over when from or destined to competitive points on or via the L. & N. R. R., from or to sidings, warehouses, or industries located on tracks of I. C. R. R. (see Rule 14).

5. On freight traffic to or from non-competitive points the L. & N. R. R. will not absorb the switching charges of the I. C. R. R., except as specified in Note 6 (see Rule 14).

6. The L. & N. R. R. will absorb the switching charges of the I. C. R. R. on the following freight traffic from non-competitive points (see Rule 14):

Cast iron pipe from foundries on the L. & N. R. R. or N. C. & St. L. Ry.

Cement from Richard City, Tenn.

#Cotton ties and iron and steel articles from Helena, Ala.

Pig iron from furnaces on the L. & N. R. R. or N. C. & St. L. R.

All freight from Pensacola, Fla.

7. (*a*) Non-competitive Points: By "non-competitive points" it is meant:

Points reached only by rails of the L. & N. R. R., except as provided for in Note 6, and except Paris and McKenzie, Tenn.

Points reached only by rails of Railroad having track connection with the L. & N. R. R. only.

Points reached only by rails of the N. C. & St. L. Ry., except as provided for in Note 6, and except Paris and McKenzie, Tenn.

Points reached only by rails of railroads having track connection with the N. C. & St. L. Ry. only.

(*b*) Competitive Points: All points not included in the de-
107 scription of "non-competitive points," but this is not to be considered as authorizing the absorption of switching other than specifically provided for in the foregoing rules.

8. Upon request of the shippers or consignees, cars arriving at Henderson, Ky., via the L. & N. R. R., will be placed upon switches, tracks, or at warehouses or industries reached by and connecting with the tracks of the L. & N. R. R. or L. H. & St. L. Ry., and such placement or delivery shall constitute delivery of the freight to the consignee. When cars are placed upon the usual interchange track with other connecting railroads, such placement or delivery shall constitute delivery of the freight to the consignee so far as it concerns the duty of the L. & N. R. R.

Any subsequent switch movement to a location on L. & N. tracks will be considered a local movement, and will be subject to charges and rules as provided for in Rule 9, except that car rental charge will not be assessed where no part of the shipment has been unloaded nor additional freight has been placed in the car.

9. The L. & N. R. R. does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Ky., Terminals, but where any such service is performed as an accommodation a charge of $2.00 per car plus $2.00 per car for car rental shall be assessed.

10. (*a*) On cars switched over the Incline Track of the L. & N. R. R. to industries on the L. H. & St. L. or L. & N. R. R. in Henderson, Ky. switching limits, a charge of $2.00 per car for switching service and $1.00 per car for handling from wharf boat to cars will be assessed.

(*b*) The L. & N. R. R. will refund the switching charge of $2.00 so assessed upon submittal of evidence of the forwarding of grain or milled products of grain via the L. & N. R. R. to points on or beyond its line.

(*c*) The L. & N. R. R. will participate with the L. H. & St. L. Ry. in refunding the switching charge of $2.00 per car assessed as
108 per paragraph A, upon submittal of evidence of forwarding of Grain or the milled products of grain via L. H. & St. L. Ry. to points on or beyond its line.

11. (*a*) The switching and car rental charge as specified in note 9, on corn cobs, grain, or milled products of grain from warehouses or elevators on the tracks of the L. & N. R. R. or L. H. & St. L. Ry. to mills within the yard limits of Henderson, Ky., for remilling, will be refunded to the shipper upon submittal of evidence of the forwarding of the milled products to points on or via the L. & N. R. R. (Files 45165, 380000, Sub-pad 7.)

(*b*) The L. & N. R. R. will participate with the L. H. & St. L. Ry. in refunding to the shipper the switching and car rental charge as specified in Note 9 on corn cobs, grain, or milled products of grain, from warehouses or elevators on the tracks of the L. & N. R. R. to mills within the yard limits of Henderson, Ky., for remilling, upon submittal of evidence of the forwarding of the milled products to points on or via the L. H. & St. L. Ry.

12. The Bulk or Team Tracks of the L. & N. R. R. are for the use of the business of that road, and can not be used for loading or unloading shipments of freight received from or delivered to connecting lines at Henderson, Ky.

13. This tariff is subject to the rules and conditions of the Classification under which shipment is handled, when such rules or conditions are not in conflict with those provided in this tariff.

14. Settlement for switching charges to reach receivers or shippers on tracks of connecting lines at Henderson, Ky., whether such charges are absorbed by this company or added to its rates to and from Henderson, Ky., must be made by the L. & N. Railroad direct with the connecting lines performing the switching service, and in no case will the L. & N. Railroad pay any switching charge to any shipper or receiver; the payments must in all cases be made direct to the connecting line or lines performing the service.

#Changes or Additions.

Issued December 21, 1909. Effective February 1, 1910.

Issued by D. M. Goodwin, General Freight Agent, Louisville, Ky.

File 438,694 (Helena, Ala.).

Switching Charges at Henderson, Ky.—Continued.

Feeding Charges.

Feeding Charges on Live Stock, Carloads, at Henderson, Ky., Handled by Bourbon Stock Yards.

Kind of live stock.	Kind of feed.	Charges (see notes).
Horses and Mules	any kind	$4.50 per car
Hogs	any kind	$4.00 per car
Sheep	any kind	$3.00 per car

NOTE 1.—Feeding charges are in addition to the freight rates.
NOTE 2.—The L. & N. R. R. Co. does not guarantee the above charges.

Elevation Charges at Henderson, Ky., on Grain Destined to Points in Southeastern and Carolina Territories, to Kentucky Junction Points, to Virginia Cities, and to Local Stations on the L. & N. R. R.

The Maximum amount that will be paid by this Company for elevation of grain from and through Henderson, Ky., will be as follows:

Destination.	Per hundred pounds except as noted.
Points in Southeastern territory (for description see N. S. 2577, I. C. C. No. A-9642, of December 16, 1907, or subsequent issues	¾ of one cent.
Points in Carolina Territory (for description see N. S. 2577, I. C. C. No. A-9642, of December 16, 1907, or subsequent issues)	¾ of one cent.
110	
#Virginia Cities	¼ of one cent per bushel.
Lexington, Frankfort, Junction City, Maysville, Paris, Winchester, Midway, Nicholasville, Richmond, Shelbyville, Versailles, Georgetown and Walton	¾ of one cent.
Nashville, Clarksville, Tenn., Central City, Elizabethtown, Nortonville, Gracey, and Hopkinsville, Ky.	¾ of one cent.
Local stations on the L. & N. R. R.	¾ of one cent.

Files 126,829-198,124, 105,178 (Reissue).

Transfer Charges

Between Depot of the Louisville & Nashville R. R. and Depots of Connecting Lines at Henderson, Ky., Incident to the Interchange of Through Business at That Point.

Cost of Transfer.

Connecting line.	Car loads per car except as noted.	Less than car load, classes of freight.	Per hundred lbs. except as noted.	Which line pays minimum charge.
		When cars available, transfer in cars, no charge accruing. When cars unobtainable, transfer by dray at 3 cents per 100 lbs.		See note 1.
I. C. R. R.	None	All classes	.....	None.
L. H. & St. L. Ry.	None			

NOTE 1.—(*a*) The following rules will apply in settlement of transfer charges on through traffic interchanged at Henderson, Ky.:

On through traffic originating at—	Destined to—	If delivered to or received from connections.	Transfer charges assumed by—
Competitive Points	Non-competitive Points	Delivered	L. & N. R. R.
Competitive Points	Competitive Points	Delivered	Connecting Line
Non-competitive Points	Competitive Points	Delivered	Connecting Line
Competitive Points	Non-competitive Points	Received	Connecting Line
Competitive Points	Competitive Points	Received	L. & N. R. R.
Non-competitive Points	Competitive Points	Received	L. & N. R. R.
Non-competitive Points	Non-competitive Points	Delivered or Received	See Note B.

(*b*) On traffic received from or delivered to connecting lines originating at and destined to non-competitive points, the cost of transfer will be in addition to the rates of each line and will be billed out as charges by the receiving line.

Car Service and Storage Rates, Rules, and Regulations.

See Car Service and Storage Tariff G. F. O. 947 (I. C. C. No. A-9804, of March 15, 1908), supplements thereto or subsequent issues thereof.

Changes or Additions.

Issued November 30, 1909. Effective January 2, 1910.

File 105,178.

Issued by D. M. Goodwyn, General Freight Agent, Louisville, Ky.

Switching Charges at Henderson, Ky.—Continued.

Switching Charges Between Switches, Tracks, Warehouses, and Industries on the Louisville & Nashville Railroad and Its Connection with the Illinois Central R. R. on Fifth Street, and with the Louisville, Henderson & St. Louis Ry. (See Note) on Carload Traffic Except as Noted in Note.

The switching charge to or from any industries located on L. & N. tracks within switching limits, not shown in list below, will be the same as the charge to or from industries next beyond.

	Industries	Business	Location	L. & N. R. R. switching charge per car
	Anderson Box & Basket Co	Baskets	Vine & Alves Sts	$2.00
	City Electric Light Plant	Power House	Fourth & Elm Sts	$2.00
	City Mills	Flour Mill	Main St	$2.00
	Coquillard Wagon Co	Wagon Mfg	Obryn & Adkisson Sts	$2.00
	Elliott, William	Tobacco Warehouse	Main St	$2.00
	Farnworth, R. P	Brick	Belt Line	$2.00
	Gallaher Limited	Tobacco Warehouse	Main St	$2.00
112	Henderson Brewing Co	Brewery	Water & Fifth St	$2.00
	Henderson Cotton Mills	Cotton Goods	Washington St	$2.00

Henderson Elevator Co.	Grain and Hay	Foot of Third St.	$2.00
Henderson Tobacco Extract Works	Extract and Fertilizer	Audubon St.	$2.00
Kroyer, Henry	Distillery	Foot of Center St.	$2.00
L. & N. River Incline	Transfer Track	Ohio River	$2.00
Marshall & Alves	Feed, Sand, etc.	Main & Anderson Sts.	$2.00
St. Bernard Coal Co. / R. A. Powell, Agent \	Coal	Fourth St.	$2.00
Standard Oil Co.	Coal Oil, etc.	Fourth & Adams Sts.	$2.00
Waller, A. & Co.	Grain and Hay	Fourth St.	$2.00

#See Note 10, page 130.

NOTE.—No charge will be made for switching for L. H. & St. Ry.

Switching Charges Between Switches, Tracks, Warehouses, and Industries on the Illinois Central Railroad and Its Connection with the Louisville & Nashville R. R. on Fifth Street on Carload Traffic.

NOTE.—The list of industries and switching charges of the Illinois Central R. R., enumerated below, is published as a matter of information and for convenient reference. The fact of an incorrect switching charge being shown, or of an industry and the accompanying charge not being included in the list, will not operate to prevent absorption of the switching charge of the Illinois Central R. R. as authorized in rule 4, page 130.

Industries.	Business.	Location.	Ill. Cent. switching charge per car from or to connection with L. & N. R. R.
Clore, F. L. & Son	Saw Mill and L'b'r Yard	Fifth St.	$2.00
Marshall Furniture Co.	Furniture	Jefferson St.	$2.00
Wenverton, Ky.	Team Tracks	All Freight except Grain	$2.00
Winstead Distillery Co.	Whiskey	Foot First St.	$2.00

113 *Switching Charges Between Switches, Tracks, Warehouses, and Industries on the Louisville, Henderson & St. Louis Railway and Its Connection with the Louisville & Nashville R. R. on Carload Traffic.*

NOTE.—The list of industries and switching charges of the L. H. & St. L. Ry. enumerated below, is published as a matter of information and for convenient reference. The fact of an incorrect switching charge being shown, or of an industry and the accompanying charge not being included in the list, will not operate to prevent absorption of the switching charge of the L. H. & St. L. Ry. as authorized in rule 4, page 130.

Industries.	Business.	Location.	L., H. & St. L. R'y switching charge per car.
Conway, S. B.	Coal	Third St.	
Delker, Geo. & Co.	Buggies	Katterjohn St	Note.
Sandefur, T. A.	Flour	Alzasia & First Sts.	

NOTE.—No charge will be made for switching for L. & N. R. R.

No change in this page.

On April 30th, 1910, the following deposition of R. W. Powell was filed herein to be read as evidence on behalf of the defendant, viz:

Deposition of R. W. Powell, Taken Pursuant to the Attached Notice, at the Louisville & Nashville Office Building, Louisville, Kentucky, on the 20th Day of April, 1910, to be Read as Evidence on Behalf of the Defendant on the Trial of the Above-styled Cause.

R. W. POWELL, being first duly sworn, was examined by Mr. Moorman, and testified as follows:

1. State your name, residence and occupation?

A. R. W. Powell, residence Henderson, Ky.; occupation Freight Agent of the Louisville & Nashville Railroad Company at that point.

2. How long have you been Freight Agent for the Louisville & Nashville Railroad Company at that point?

114 A. About seven years.

3. As such agent you have the control of the placing of cars for industrial plants in Henderson?

A. Yes, I have control of the yard work.

4. Are your duties in that respect under the supervision of the Traffic Department?

A. Transportation Department.

5. Transportation Department?

A. Yes sir.

6. Are you familiar with the location of the mine of the Keystone Mining & Manufacturing Company, Mr. Powell?

A. Yes sir.

7. Where is that located with reference to the switching limits in the yards at Henderson?

A. The plant is located near the extreme part of the switching limits, I believe within about 800 to 1000 feet of the limit.

8. Is it within the switching terminal?

A. It is within the switching terminal.

9. Is there a station at that place, or stop for trains?

A. No sir, there is not.

10. Is there a side-track built into the plant or up to the plant for the reception of cars?

A. Yes sir, there is a side-track built into the plant.

11. Do you know what the length of this side track is?

A. I believe that track extends about 1000 feet on each side of the plant.

12. Does it connect with the main line of the Louisville & Nashville Railroad or with the belt?

A. No sir, with the main line.

13. With the main line?

A. Yes sir.

14. Do you know Joe Higdon, who is doing business in

115 Henderson as the Crescent Coal Company?

A. Yes sir; I am acquainted with Higdon.

15. Prior to July 1, 1908 did Mr. Higdon order a car from you to be placed at the plant of the Keystone Mining & Manufacturing Company to be switched to any industrial plant in Henderson?

A. No sir, he did not.

16. Prior to that date did the defendant Louisville & Nashville Railroad *switch* a car for Mr. Higdon from the Keystone Mining & Manufacturing Company to the Electric Light Works in Henderson?

A. Yes, the Louisville & Nashville Railroad did switch a car of coal from the plant of the Keystone Mining Company to the Electric Light Plant switch for account of the Crescent Coal Company.

17. Under what circumstances was that service performed?

A. The car had been ordered by the Keystone people for loading to Owensboro, Kentucky. After the car was loaded we were notified that the Owensboro people had refused to take the coal, and we were requested to switch the car to the Electric Light plant, which we did in order to release the car from load.

18. Was the Louisville & Nashville Railroad at that time or prior to July 1, 1908 engaged in the business of switching cars between industrial plants in the City of Henderson?

A. No, we have never engaged in local switching from one point to another except on grain and grain products from an elevator to a mill, or vice versa.

19. Subsequent to July 1st, 1908 did Mr. Higdon make any requests of you to switch for him carloads of coal from the plant of the Keystone Mining & Manufacturing Company to industrial plants located within the switching limits of Henderson?

A. Yes sir, he did. He made a number of requests subsequent to July 1st, 1908.

20. Did you furnish him cars for that purpose.

A. We did not.

116 21. Why didn't you furnish him cars for that purpose?

A. We hadn't made a practice of local switching, and in the absence of specific instructions with reference to that particular plant, we refused to furnish the cars and perform the service.

22. Did you so inform Mr. Higdon at the time of these requests?

A. I did.

23. Did you know that Mr. Higdon had a contract with the Keystone Mining & Manufacturing Company to take a certain amount of the output of that mine under contract dated July 1st 1908 prior to the date of the contract, or did you learn of the contract subsequently?

A. I knew nothing of the contract until subsequent to July 1st, 1908.

24. Now you say Mr. Powell that the Company was not at that time or at any time engaged in the business of switching cars between industrial plants in the City of Henderson. Did the company perform this service as auxiliary to a transportation service, that is when a car came in to Henderson on another line the L. H. & St. L. Ry., or the Illinois Central, did the Louisville & Nashville Railroad then switch that car for the initial line to the place of business of the Crescent Coal Company or the place of business of its customer?

A. Yes, cars arriving via the Illinois Central or L. H. & St. L. consigned to the Crescent Coal Company would be delivered to the Louisville & Nashville Railroad, in case they wanted it to go to any plants on the Louisville & Nashville track within the city limits of Henderson. These cars would be delivered on instructions of the Illinois Central Road, and not the consignees.

25. Did you perform any switching service of that kind for the Illinois Central Railroad subsequent to July 1st, 1908?

A. Yes sir.

117 26. Were these cars delivered to you at the interchange track of the Illinois Central with the Louisville & Nashville Railroad?

A. Yes sir, they were placed upon our connecting track.

27. Against whom was the charge for switching made in cases of that kind?

A. The charge would invariably be made against the connection or the connecting line ordering the service performed, but in case the coal or freight came from a non-competitive point, the charge would be collected from the consignee by request of the connections.

28. Did you look to the road delivering the coal to you for the charges?

A. We invariably looked to our connections for the charge.

29. Has the Illinois Central or the L. H. & St. L. Railway a side track running into the plant of the Keystone Mining & Manufacturing Company?

A. No sir, they have not.

30. Where is the Electric Light Plant at Henderson and the plant of A. Waller & Company located with reference to the switching limits of the City of Henderson?

A. The Electric Light Plant is located on the L. & N. tracks within the switching limits and the plant of A. Waller & Company is located on joint Illinois Central and L. & N. tracks.

31. Did the Louisville & Nashville Railroad Company prior to July 1st, 1908 switch any car for the Crescent Coal Company from the plant of the Keystone Mining & Manufacturing Company to any other plant in Henderson, except the car that you have mentioned?

A. I think there were three cars switched from the Keystone mines to the Electric Light plant and the Henderson Elevator Company's plant.

32. Does that include the car that you have mentioned?

A. Yes sir.

33. Under what circumstances were the other two cars switched?

A. Under the same conditions as the first car or as the

118 other car mentioned. In each case the Company furnished the cars with the understanding that they were for shipment out of the City.

34. You were then informed that the order for the cars had been cancelled?

A. Not until after the cars had been loaded.

35. Then to relieve the cars and as accommodation to Mr. Higdon, the cars were switched to industrial plants in Henderson?

A. Yes.

36. When did Mr. Higdon first request that you switch cars for him from the Keystone Mining & Manufacturing Company to industrial plants at Henderson regularly?

A. Beginning with July 1st, I think, 1908.

37. Did you at any time offer to perform that service at all; and if so at what rate and under what circumstances?

A. We offered to furnish the cars and perfrom that service under date of July 13th, I believe.

38. July 13th?

A. July 13th, 1908, on a rate of fifty cents per ton.

39. What was done with that offer by Mr. Higdon?

A. It was refused.

40. Declined?

A. He declined to accept the rate.

41. Did he at any time offer any car to be switched from the Keystone plant to another industrial plant in Henderson at the rate that you offered on July 13th?

A. No? he did not. He continued to order cars after that rate was made for some time, and we would invariably ask him if he wanted the car handled on the basis of fifty cents per ton, and he said no, on switching rate.

42. What did you do with this proposition to handle on switching rate?

A. We declined to furnish the cars.

119 43. How long did that offer remain open?

A. From July 13th, 1908 until August 13th of the same year.

44. What was done on August 13th?

A. The Crescent Coal Co. were notified that we would not handle the coal at all.

45. That is between the mines?

A. Yes, between the mines and the various industries within the switching limits of Henderson.

46. Did the Louisville & Nashville Railroad Company at any time refuse to handle coal for the Crescent Coal Company or refuse to furnish cars for the shipment of coal from the Keystone Mining & Manufacturing Company to any point outside the switching limits of Henderson?

A. No, the Louisville & Nashville Railroad has never refused to handle coal from either the Crescent Coal Company or the Keystone mines for points out of the city, in fact we have furnished the Keystone mines with all cars that they have placed requisition for where the shipments were going out of the city.

47. Has the Louisville & Nashville Railroad Company at any time refused to switch to the mines of the Keystone Mine & Manufacturing Company for the Crescent Coal Company cars coming in to Henderson from points outside of the city?

A. No sir, they have not.

48. State whether or not when you notified Mr. Higdon on July 13th, 1908 that the Company would handle this coal at the rate of fifty cents a ton he asked you to show your authority for charging fifty cents?

A. The rate of fifty cents per ton was given him on July 13th. I don't recall that he ever asked that question.

49. Did you quote Mr. Higdon from the 1st day of July up to and including the 13th day of July a rate of fifty cents a ton or did you quote the rate of fifty cents a ton on the 13th day of July?

120 A. We quoted the rate of fifty cents per ton on the 13th day of July.

50. Prior to the 13th day of July you had not given him any rate?

A. No sir. And the rate of fifty cents per ton was quoted subject to their accepting it.

51. Had that rate ever been authorized?

A. No sir, it had never been authorized?

52. Did you inform Mr. Higdon that you would have to take that matter up with the traffic officials?

A. I did.

53. Did you take it up with the traffic officials.

A. Yes sir.

54. With what result?

A. It had to be withdrawn.

55. Were you instructed to withdraw it?

A. Yes sir.

56. And when did you withdraw it?

A. August 13th 1908.

57. Do you remember Mr. Higdon making you a tender of $4.00 to switch a car from the mine of the Keystone Mining & Manufacturing Company to the plant of A. Waller & Company on August 26th, 1908?

A. No sir.

58. You have no recollection of that?

A. I have no recollection of that.

59. At that time you did refuse however to switch cars from the Keystone Mining & Manufacturing Company to A. Waller & Company or any other industrial plant in Henderson, where there was not a transportation service in connection with it?

A. Yes sir.

60. If Mr. Higdon had made such a tender to you on that date would you have accepted the money and switched the car or would you have declined it?

121 A. No sir, I would have declined it.

61. Did you prior to July 1st, 1908 or prior to August 13th, 1908 switch any car of coal from the Keystone Mining & Manufacturing Company to the plant of the Henderson Elevator Company for the account of the Crescent Coal Co.?

A. No sir.

62. Did you at any time switch a car of coal from the Keystone Mining & Manufacturing Company's plant to the plant of the Hen-

derson Elevator Company, for the account of the Crescent Coal Company?

A. Yes sir.

63. Under what circumstances?

A. The first car had been furnished the mines on requisition, for loading to Owensboro, and after being loaded they advised that they could not make shipment, and to release the car we switched it for Mr. Higdon of the Crescent Coal Company. That service I believe was performed in the first part of April 1908.

64. Was that for the purpose of releasing the car and as a matter of accommodation for Mr. Higdon?

A. It was.

65. Did you on two other occasions switch a car of coal for the account of the Crescent Coal Company from the yards of R. A. Powell to the Electric Light Plant?

A. I don't recall switching two cars for the Crescent Coal Company in particular. We have switched a number of cars from Mr. Powell's yard that would be placed there for unloading and subsequently sold by him to other dealers and commercial industries. I don't recall this particular instance.

66. Why did you switch those cars?

A. A car that has been placed at the consignee's plant, and is ordered to another plant or team-track, if no part of the load has been taken from the car, or other freight placed in the car, we switch those cars at the usual switching charge which is authorized under rule 8 of the Company's Terminal Switching Tariff.

67. Were these cars that you speak of having switched
122 from Powell yard, cars that had been loaded with coal at the plant of the Keystone Mining & Manufacturing Company, or were they cars that had been loaded at some other point outside of Henderson, and had been brought into Henderson, on which there was a transportation service and transportation charge?

A. They were cars that had been loaded outside of Henderson and brought in to Henderson on a transportation charge?

68. Did you ever at any time switch for the account of the Crescent Coal Company from the yards of R. A. Powell to the Electric Light Works or any other industrial plant in Henderson any carload of coal that had been loaded at the plant of the Keystone Mining & Manufacturing Company?

A. No sir.

69. Did you at any of these times switch for the account of the Crescent Coal Company a number of cars, possibly forty or fifty from the Illinois Central Railroad to the Electric Light Plant?

A. Yes, we have switched a number of cars from the Illinois Central Road to the Electric Light plant for account of the Crescent Coal Company. Those cars were given up and ordered placed at that plant by the Illinois Central road.

70. Were these cars loaded with coal at mines outside of the city of Henderson?

A. Yes sir.

71. Did you ever at any time for the account of the Crescent Coal

Company — a car from the Illinois Central Railroad or from their interchange track to an industrial plant in Henderson where the car was loaded at the plant of the Keystone Mining & Manufacturing Company?

A. No sir.

72. Were the cars that you switched for the account of the Crescent Coal Company from the interchange track of the Illinois Central cars that had been brought into Henderson by the Illinois
123 Central from mines out on its line?

A. They were.

73. When you switched a car from the interchange track of the Illinois Central Railroad Company to an industrial plant in the city of Henderson, on whose request was that service performed?

A. On request of the Illinois Central Railroad invariably.

74. Has the Company at any time, or would it have done so between July 1st, 1908 and August 13th, 1908, switched a car for the Illinois Central Railroad if the car had been loaded at the Keystone Mining & Manufacturing Company and was intended for an industrila plant in the city of Henderson on the tracks of the Illinois Central Railroad?

A. We would not if we knew where the car was going to. Cars given us by the Illinois Central would be given us on instructions merely to place them at the mines for loading and to be returned to their connections. We would not know the destination of those cars. We have no way of knowing. The cars are handled on switching orders.

75. Who pays the switching charge in that case?

A. The connecting lines or the line that orders the car switched.

76. Have you ever collected from the Crescent Coal Company or the Keystone Mining & Manufacturing Company switching charges on a car of coal switched from the mines of the Keystone Mining & Manufacturing Company to the interchange track of the Illinois Central Railroad?

A. Yes, I believe we did on the cars that we switched to the mines from the Illinois Central Railroad for the account of the Crescent Coal Company, and upon instructions of the Illinois Central Road. I believe the charges were all collected from the Crescent Coal Company. While we look to the Illinois Central for these charges, whenever a switching charge is not absorbed by the Illinois Central Road we are instructed to make collection direct from the consignee or consignor.

124 77. Is that charge originally a charge against the Illinois Central Railroad?

A. It is originally charged against the Illinois Central Railroad Company.

78. And the collection made for the Illinois Central Railroad?

A. Yes sir.

79. What do you mean by being absorbed, Mr. Powell?

A. Deducting the amount of the switching charge from the company's revenue.

80. In switching the two cars which you have referred to, or the

number of cars which you have referred to from the yard of R. A. Powell in the City of Henderson to industries in the city of Henderson, was the service which you performed in that respect an auxiliary to a transportation service?

A. It was.

81. Were these cars loaded outside the city of Henderson and brought into Powell's yard by the Illinois Central Railroad or some other road?

A. They were brought in by the Louisville & Nashville Railroad; loaded outside of the city on the Louisville & Nashville line, and brought into Henderson over the Louisville & Nashville Railroad.

82. And this service was merely an auxiliary service to the transportation of the car into the city of Henderson?

A. Yes sir.

83. Have you the tariff published by the company governing the Henderson terminals for the period from July 1st, 1908 to July 1st, 1909?

A. Do you mean have I that here?

84. Yes.

A. Yes sir.

85. Mr. Higdon filed with his deposition terminal tariff of the Louisville & Nashville Railroad Company, containing rates,
125 rules and regulations for stations on the Louisville & Nashville Railroad, marked J. H. Exhibit #10. I will get you to refer to page 130 of that tariff and state whether or not that is the tariff in force and effect between July 1st, 1908 and July 1st, 1909?

A. Yes sir.

86. It is?

A. It is.

87. I will get you to refer to section 9 on that page and read that to the Court:

A. Rule 9 reads: "The Louisville & Nashville Railroad does not engage in the business of local switching between switches, tracks warehouses or industries in the Henderson, Kentucky, terminals, but where any such service is performed as an accommodation a charge of two dollars per car plus two dollars per car for car rental shall be assessed."

88. Mr. Powell, was the Company at the time referred to in your testimony, or at any time subsequent to that time, or prior to that time engaged in the business of switching cars between industrial plants in the city of Henderson, or switching any cars between *between* industrial plants in the city of Henderson except in the instances which you have mentioned, that is to relieve the cars for the Crescent Coal Company, and as an accommodation to that Company and except where that service was performed as an auxiliary to a transportation service?

A. No sir. The Company has never to my knowledge engaged in any local switching except just those few instances cited, and in those cases merely as an accommodation or to release the cars from loads they were under.

89. There were two or three of those cases?

A. Three I believe.

90. Now Mr. Powell, do you know what it costs per ton to deliver coal by drays in Henderson?

126 A. There is an established price among the various draymen for handling coal from coal cars in the yards or any part of the city of thirty cents per load. I have had one or two carloads of coal delivered to my residence on that basis. A load of coal is thirty bushels.

91. A bushel is how many pounds?

A. That is 2400 pounds I believe.

92. That would be a rate of not exceeding thirty cents a ton?

A. Yes, a little less than thirty cents a ton.

Cross-examined by J. W. CLAY, counsel for plaintiff:

93. At whose instance did you furnish the car to be loaded with coal at the Keystone Milling Company and switched to the Electric Light plant for account of the Crescent Coal Company prior to July 1st, 1908?

A. That car was furnished on requisition from the Keystone mines for a car to load to Owensboro, Kentucky.

94. Was that requisition given verbally or in writing?

A. Verbally.

95. By whom was it given?

A. I believe Mr. Bosseman, who was Manager of the Keystone mine at that time.

96. To whom was it given?

A. It was given to my office. I don't know that it was given to me personally, but I do know that after the car was loaded that I was advised personally by the mine people that they could not dispose of it in Owensboro.

97. You were advised by whom?

A. By the mine people.

98. What mine people?

A. The Keystone Mine people.

99. How was that advice given to you by the Keystone Mine people?

A. By telephone.

100. By whom?

127 A. I can't recall just who gave that advice.

101. To whom was it given?

A. It was given to me.

102. Who directed you then to deliver it to the Electric Light plant for account of the Crescent Coal Company?

A. As well as I can recall the instructions were given, or rather the request was made by both the Crescent people and the Keystone people.

103. You have no recollection and don't know of your own personal knowledge what orders were given at all when the car was first placed with the Keystone Mining Company?

A. Yes, I know the order was given for cars to load to Owensboro.

104. Do you know that of your own personal knowledge?

A. I do.

105. How can you know that, if you do not know to whom or what employé in your office the requisition was given?

A. We have a book in which we keep a memorandum of every order given the office for an empty car to be loaded or for a loaded car to be switched, and the records show that not only that car but the other two cars were switched from the mines to industries at the request of the Keystone and the Crescent people and were ordered to be loaded for Owensboro.

106. What other cars besides the one delivered to the Electric Light plant did you deliver inside the switching limits of the City of Henderson?

A. Two other cars I believe.

107. Who were they to?

A. One to the Henderson Elevator Company, and I believe the other to the Electric Light plant, or possibly both to the Henderson Elevator Company.

108. For whose account were they delivered?

128 A. Crescent Coal Company.

109. Who ordered the car delivered to the Henderson Elevator Company in the instance of the car that was delivered to the Henderson Elevator Company?

A. I don't know whether the request was made by the Keystone people or by the Crescent Coal Company.

110. Do you know to whom the request was made?

A. It was made to my office. I don't know who took the order.

111. Can you say that it was made to yourself?

A. No sir, I can not.

112. Is it not a fact that it was made to some one else in your office other than yourself?

A. I don't recall just who took the request, or who it was given to, whether to me personally or some other member of the office.

113. Now to whom was the notice in that instance given that it could not be disposed of in Owensboro, and request made to deliver it to the Henderson Elevator Company?

A. I do not recall whether that request was given to me personally, but I do know that before the cars were switched I was consulted.

114. You don't know whether you gave the instructions or whether the Keystone People consulted you direct, or whether the Crescent Coal Company consulted you direct, or whether the Henderson Elevator Company consulted you direct?

A. I think on the car from the Henderson Elevator Company that Mr. Bullitt made the request.

115. Made the request that it be diverted and be delivered to him?

A. Yes.

116. Now do you recall of whom he made that request?

A. Yes, he made that request of me.

117. Did he tell you then that it was a car that could not

129 be disposed of in Owensboro?

A. No sir, I knew that the car was out there, and had

been standing under load for several days, and I knew that that was the car he had purchased when he stated he purchased a car from the Keystone mines.

118. Now how did you know that Mr. Powell?

A. I knew it from the records.

119. Isn't it a fact that all Mr. Bullitt told you was that he had purchased a carload of coal from the Keystone Mining Company and he wanted you to deliver it to his plant, and that you told him you would deliver it and did deliver it and did not charge him for that the regular switching charge?

A. No, that is not a fact. It is a fact that we charged him the regular switching charge, but I knew that the car had been standing there under load for several days, and that the Keystone people claimed that they could not dispose of it out of Henderson.

120. My question to you was, did Mr. Bullitt know that or did you tell Mr. Bullitt that?

A. I can't recall, but I believe that I told Mr. Bullitt that we would switch the car because it was standing there under load and could not be shipped to the point for which it was loaded.

121. Now did not Mr. Bullitt tell you on that occasion that it was loaded for his account?

A. No sir, he did not.

122. Did the Crescent Coal Company have anything to do with that load of coal?

A. No, I think not.

123. That was a transaction directly between the Henderson Elevator Company and the Keystone Mining & Manufacturing Company?

A. That is my recollection.

124. Now on what other occasion did you deliver a load of coal from the Keystone Mining & Manufacturing Company to an
130 industry in Henderson?

A. About the same time that this car was handled, we handled one or two other cars.

125. You have mentioned now the one delivered at the Henderson Elevator, and one delivered at the Electric Light plant. Now where was the other car that you mentioned delivered?

A. I don't recall, but I think it was either at the Electric Light plant or the Henderson Elevator.

126. At whose request was that delivery at the Electric Light plant?

A. At the request of both the Keystone mines and the Crescent Coal Company.

127. Do you know who represented the Keystone Mine in making the request on that occasion?

A. I think Mr. Bosseman.

128. Who represented the Crescent Coal Company in making the request on that occasion?

A. Mr. Jo Higdon.

129. Who represented the Railroad Company to whom the request was made?

A. I did.

130. That request then for that third car was made direct to you?

A. Now I can't say that it was.

131. Do you know to whom it was made?

A. It was made either direct to me or to my office.

132. You don't know which?

A. No sir.

133. Did you notify Mr. Higdon on that occasion that the car had been loaded for shipment elsewhere and on that occasion you would deliver it for him?

A. I don't know that I did. I think the mine people called
131 him and notified him, and asked him if he couldn't take it off their hands.

134. Mr. Higdon you think called some one in the office and told you to deliver that car to the Electric Light plant?

A. Mr. Higdon either made the request upon me or the office, I don't know which.

135. Now to whom did you charge the service for those three cars, and against whom did you take out a bill?

A. I don't recall, but I believe bills for two cars were made against the Crescent Coal Company, and the one car that I recall that went to Henderson Elevator Company I believe the bill was rendered against the Henderson Elevator Company.

136. Do you remember what charge was made on those bills?

A. $2.00 per car.

137. Was that in full, or was there any car rental charge?

A. No, I don't think the tariff provided for car rental at that time. That was the 1st of April or prior to April 1908.

138. Is it not a fact that the only difference between your tariff in effect at the time that shipment was made and the tariff in effect on the 1st day of July was one single difference; that then the charge of $2.00 embraced the whole charge, whereas under the tariff that went into effect a short while prior to the 1st day of July you charged $2.00 per car car rental and $2.00 per car switching charge?

A. Yes, I think that is a fact.

139. In other respects the two tariffs were the same?

A. Yes sir.

140. Did the Louisville & Nashville Railroad, or has the Louisville & Nashville Railroad at any time shipped any sand from the yard of Marshall & Alves to any point or industry inside the switching limits of the City of Henderson?

A. No sir, not to my knowledge.

132 141. Have they shipped any grain or hay or other product to or from Marshall & Alves to any other industry in the city of Henderson?

A. I think there has been a slight movement of corn or wheat from the elevator of Marshall & Alves to possibly some of the mills or elevators there.

142. Did you know where Marshall & Alves received that grain or corn, or whatever it may have been?

A. The bulk of the corn is purchased from wagons.

143. The farmers deliver the bulk of their corn as they gather it, or as they bring it from their farms, and deliver it at their warehouse?

A. Yes, sir; they have received corn by rail.

144. Now then you say that on a number of occasions Marshall & Alves have loaded grain into cars and shipped it over the Louisville & Nashville Railroad tracks to different Mills in Henderson?

A. I don't know that to be a fact; there have been a few cars of grain handled from Marshall & Alves Elevator.

145. Do you know whether that was prior to or since the 1st day of July 1908?

A. No, I do not.

146. Do you know what charge was made for that service?

A. No, I do not know that that service was actually performed.

147. You say you believe it was performed?

A. Yes. If it was performed we charged $2.00 per car switching when the tariff provided for that charge only for the switching charge; and $4.00 per car when the tariff was changed to $2.00 per car for switching and $2.00 rental.

148. If that was done then under the tariff that was in effect on the 1st day of July 1908 you charged $4.00 per car for that service, and under the tariff in effect prior to that time you charged $2.00 per car.

A. If the tariff read that way.

133 149. Now that $4.00 charge covered the charge of $2.00 for switching and $2.00 for car rental, did it not?

A. Yes sir.

150. The railroad company does switch grain from the River to various elevators in the city of Henderson, does it not?

A. Yes sir.

151. The grain is loaded into a car at the wharf or at the river, and is then switched to the various elevators and there delivered to them, is it not?

A. Yes.

152. Now what charge do you make for that service $3.00 per car?

A. $3.00 per car, yes sir.

153. Where is the plant of the Peerless Distillery located on the Louisville & Nashville Railroad Company?

A. In the Henderson yards.

154. In or outside of the switching limits of the City?

A. Inside.

155. How far is the Peerless Distillery from the Keystone Mining & Manufacturing Company?

A. About three fourths of a mile.

156. Is it not a great deal less than that?

A. I don't think so.

157. Is it not a fact that on numerous occasions before the 1st day of July 1908, since the 1st day of July 1908, cars have been loaded at the Henderson Elevator Company and at A. Waller &

Company, furnished by the Louisville & Nashville Railroad Company, and switched by the Louisville & Nashville Railroad Company from one or both of those plants to the plant of the Peerless Distillery Company

A. Yes sir, that is a fact.

158. What charge has been made by the Railroad Company for that service?

A. The local switching charge that was in effect at the time the movement was made, either $2.00 or $4.00.

134 159. If made under the tariff in effect prior to July 1st it was $2.00 per car, or if under the tariff in effect after July 1st 1908 it was $4.00 a car?

A. Yes.

160. You have on several occasions also shipped and switched coal cars from the yards of R. A. Powell & Company to various industries in the city?

A. Yes sir.

161. What charge was made for that service?

A. $2.00 per car.

162. Who does R. A. Powell represent?

A. The St. Bernard Mining Company.

163. Where is the St. Bernard Mining Company located?

A. The headquarters I believe are at Earlington, Kentucky.

164. Most of the coal that is handled by R. A. Powell comes from the St. Bernard Mines, does it not?

A. Most of it. He does handle coal from other mines.

165. What is the freight rate from the St. Bernard mines to the city of Henderson?

A. Fifty cents per ton.

166. That is the same rate that you offered to perform the switching service for and furnish the car inside the city limits to the Crescent Coal Company under your letter of July 13th, 1908?

A. Yes sir.

167. How far is the St. Bernard Mine from the city of Henderson?

A. Earlington is forty two miles I believe.

168. How far is the Henderson Elevator plant from the Keystone Mining & Manufacturing Company plant?

A. About a mile.

169. How far to A. Waller & Company plant?

A. About the same distance.

170. How far to the Electric Light plant?

135 A. About a mile and a half.

171. Can you give the name of any industry to which you have switched coal for R. A. Powell under the switching arrangement mentioned by you?

A. I couldn't give that.

172. I will ask you to give the name of the one farthest away from R. A. Powell's yards that you can recall?

A. I can't recall any particular instance.

173. Do you know whether R. A. Powell has ever delivered a car load of coal to the Anderson Box & Basket Company?

A. I think they have.

174. By rail or the way you have to switch it, how far is it from R. A. Powell's yards to the Anderson Box & Basket Company's plant?

A. About a mile and a half.

175. Is it further from the Keystone Mine & Manufacturing Company to the Electric Light plant or from R. A. Powell's coal yards to the Anderson Box & Basket Company plant?

A. It is about the same distance.

176. Is it not a fact that going from your freight depot, the Electric Light plant is one block nearer the river than R. A. Powell's yard?

A. Yes, that is a fact.

177. Is it not a fact that the Anderson Box & Basket Company's plant is some five or six blocks nearer the River than the Keystone Mining plant?

A. Yes.

178. Isn't the Keystone Mining plant and the Anderson Box & Basket Company on almost a direct line from the river going out from the river?

A. Yes, the mines are just a little south of it.

179. Is it not a fact then that the distance from R. A. Powell's yards to the Anderson Box & Basket Company factory is at
136 least half a mile further than the distance from the Keystone Mining Company's plant to the Electric Light Company plant, going by rail?

A. It is hardly that difference. There is some distance, possibly four or five squares.

180. It is possibly four or five squares greater haul than would be the haul from the Keystone Mining & Manufacturing Company to the Electric Light plant?

A. Yes sir.

181. Now you say that under your tariff you only perform switching service between industrial plants as an accommodation?

A. Yes sir.

182. Under your tariff when you do perform that service you charge $2.00 per car, car rental, and $2.00 for car switching?

A. Yes sir.

183. You were unwilling and refused to perform that service as accommodation between the Keystone Mining & Manufacturing Company and the Crescent Coal Company and the various industrial plants in the city?

A. Yes sir, except in the few cases cited.

184. But you did offer as an accommodation between the 13th of July and the 13th of August to perform that service for a rate of fifty cents per ton?

A. We made that offer if accepted by the company.

185. How did you do that as an accommodation or to perform that service?

A. To perform that service.

186. You didn't offer to do it then as an accommodation?

A. No sir.

187. You were not doing it then under your tariff of rates at that place?

A. We didn't handle any coal.

188. You didn't offer to handle it at the tariff rates in effect at that time, did you?

137 A. Well, that was our proposition. I don't think the rate was in effect.

189. Was there any tariff fixing a rate of fifty cents per ton from the Keystone Mining & Manufacturing Company to any of the plants in the city of Henderson?

A. I don't know.

190. You made that offer to the Keystone Mining & Manufacturing Company and to the Crescent Coal Company after you had taken the matter up with the Traffic Department at Evansville, did you not?

A. Yes.

191. And you were authorized by the Traffic Department at Evansville to make the proposition?

A. Yes sir.

192. And you made it not based upon the tariff in effect but upon the authorization from the Traffic office at Evansville?

A. It was made by the authorization of the Evansville office.

193. Now when you made that proposition is it not a fact that Higdon demanded your authority for a rate of that kind?

A. I don't recall that he did.

194. The Louisville & Nashville Railroad Company was willing to engage in the business of switching between the Keystone Mining & Manufacturing Company plant and the various plants in the city, provided the Keystone Mining people and the Crescent Coal Company would pay them the rate of fifty cents per ton during the period from July 13th to August 13th, 1908?

A. Yes sir, that is my understanding.

195. What is the rate from Henderson, Kentucky, to Evansville, Indiana, on coal in carload lots?

A. Two cents per hundred pounds I think.

196. The average coal car is forty thousand pounds, isn't it,—what is the average coal car?

A. 60,000 to 80,000 pounds.

138 197. That is from 30 to 40 tons, is it?

A. Yes sir.

198. And you say that the rate is what to Evansville?

A. I believe it is from Henderson to Evansville two cents per hundred.

199. What would that make the average car, or what would it make per average car?

A. It would make a car of 80,000 capacity $16.00, $16.00 per car.

200. Two cents per hundred weight would be forty cents a ton?

A. Yes sir.

201. How far is it from Henderson to Evansville?

A. Ten to twelve miles.

202. What proportion of the two cent rate from Henderson to Evansville is absorbed by the bridge toll?

A. I don't know.

203. Don't you know that there is one cent per hundred of it absorbed?

A. No sir, I don't know that.

204. There is a bridge toll, is there not?

A. No sir, I don't know whether there is or not.

205. But the rate from Henderson to Evansville is a smaller rate than the rate at which you offered to do the switching inside of the switching limits from the Keystone Mining & Manufacturing Company to the industrial plants, between July 13th and August 13th, is it not?

A. Yes sir.

206. Do you ever do any switching between the plants of A. Waller & Company and the Henderson Elevator Company?

A. Yes, we switch cobs from the Henderson Elevator Company to A. Waller & Company's mill, which are ground.

207. Those cobs are loaded into cars at the Henderson
139 Elevator Company furnished by the Louisville & Nashville Railroad Company and switched from the Henderson Elevator Company to A. Waller & Company's mill.

A. Yes.

208. Now what charge is made for that service?

A. $4.00.

209. That is $2.00 per car car rental, and $2.00 per car switching charges?

A. Yes.

210. Do you ever transport corn in cars either from the Henderson Elevator Company or A. Waller & Company's Elevator to Sandifer's Mill?

A. Yes sir.

211. Corn is loaded into cars at the Henderson Elevator Company and at A. Waller & Company, furnished by the Louisville & Nashville Railroad Company, transported to the mill, delivered to the mill of Sandifer?

A. Yes.

212. What charge is made for that service?

A. $4.00.

213. Sandifer's Mill is inside the city limits of the city, isn't it?

A. Yes sir.

214. Do you ever perform switching service for corn or wheat from the elevators of A. Waller & Company and the Henderson Elevator Company to the Farlis Flour mill?

A. Yes sir.

215. The mill known as the City Mill?

A. Yes sir.

216. That is transported in cars furnished by the Louisville & Nashville Railroad Company loaded at the plants or A. Waller & Company or the Henderson Elevator Company and switched from

there to the City Mills and delivered to the City Mills at their plant?

140 A. Yes sir.

217. What charge is made for that service?

A. $2.00 per car switching, and $2.00 per car rental.

218. The City Mills is inside the switching limits of the city, isn't it?

A. Yes sir.

219. Haven't you also switched grain and corn and wheat from the elevators of Marshall & Alves to the mill of Sandifer?

A. I don't know whether we have or not. I don't recall any movement from Marshall & Alves to the Sandifer Mills.

220. Now aren't the various services that you have mentioned between the Henderson Elevator, and A. Waller & Company, in the delivery of cobs, between A. Waller & Company and the Henderson Elevator Company and the Peerless Distillery; between A. Waller & Company and the Henderson Elevator and the City Mills or Farlis Mills performed under the terminal tariff by which you prescribed a rate of $2.00 per car car rental and $2.00 per car switching charge?

A. Yes sir.

221. Isn't that the same rate that the Crescent Coal Company and the Keystone Mining & Manufacturing Company requested you to put into effect in shipping coal from the Keystone Mining & Manufacturing Company plant to the various industries in the City of Henderson?

A. That is the rate on which they wanted us to handle those cars.

222. And it is the same rate they requested you to put into effect?

A. I suppose that is what it meant.

223. What is the greatest distance from the plant of the Keystone Mining & Manufacturing Company to any industry upon the line or system of the Louisville & Nashville Railroad Company on these switches, inside the city limits?

A. I don't know. I suppose the Henderson Brewing Company would be the farthest plant, and it is a mile and a half or three-quarters.

141 224. Now you say that on the various occasions when you have handled coal for account of the Crescent Coal Company on switching arrangement from the Illinois Central, that you charged the switching rate to the Illinois Central Railroad Company?

A. Yes sir.

225. You made no charge against the Crescent Coal Company at all?

A. No.

226. Now on any of these occasions did you know where that coal had come from?

A. I did not know the exact point of origin, no.

227. Didn't you know that there were quite a number of those cars and didn't you know it at the time you received it, that were loaded at the mines of the Keystone Mining & Manufacturing Company?

A. I know that they were not loaded by the Keystone mines.

228. Now were empty cars furnished you at any time by the Illinois Central Railroad Company switched by you to the Keystone Mining & Manufacturing Company, loaded with coal, switched by you back to the Illinois Central Railroad Company for delivery to any points in the switching limits of the city on its own line?

A. The Illinois Central did give us some of their coal cars, and instructed us that they be placed at the Keystone mines. Those cars were loaded and returned to the Illinois Central Railroad, and the Illinois Central road charged with the switching.

229. Now on several occasions did you not know that that coal wa to be delivered by the Illinois Central Railroad Company to industries inside of the switching limits on its line?

A. Not until after the delivery of the coal.

230. For that service you charged $2.00 per car?

A. Yes.

231. Wasn't that done for and on account of the Crescent Coal Company?

A. It was done by request of the Illinois Central, but it was for the Crescent Coal Company.

142 232. You collected $2.00 per car switching charge from the Crescent Coal Company?

A. Yes, we first presented those bills to the Illinois Central, and they said it was a local switch, and requested us to collect from the Crescent Coal Company?

233. They told you it was just a local switch and to collect it from the Crescent Coal Company?

A. Yes.

234. Now on several of those occasions weren't the cars furnished by the Illinois Central Railroad loaded at the Keystone Mining & Manufacturing Company and then billed to the Crescent Coal Company and handled by you from the Keystone Mining & Manufacturing Company to the Crescent Coal Company?

A. No sir, I don't know that to be a fact.

235. The book that you examined awhile ago being Terminal Tariff of the Louisville & Nashville Railroad, J. A. #10, and filed with the deposition of Jo Higdon, is the terminal tariff of the Louisville & Nashville Railroad, is it not, that went into effect May 4th, 1908?

A. Yes.

236. Where did you get that book?

A. Where did I get it?

237. Yes, where did that book come from, did it come from the Rate Department of the Louisville & Nashville Railroad Company? That is the tariff of rates of the Louisville & Nashville Railroad Company is it not?

A. Terminal rates, yes.

238. I will get you to examine that tariff of rates at page 133 and state what it is?

A. Rates, Rules and Regulations governing the switching of cars at Hopkinsville, Kentucky.

239. I will get you to examine the schedule or tariff of the rate at

Hopkinsville, Kentucky, local switching charges between locations in Hopkinsville, Kentucky, City limits, and state whether or
143 not under that schedule the Louisville & Nashville Railroad Company performs switching in the city of Hopkinsville, Kentucky, between the Dalton Stone Company and all industries on the tracks of *of* the Louisville & Nashville Railroad Company in the Hopkinsville, Kentucky switching limits, stone and screenings at $3.00 per car?

A. I would understand the charge to be $3.00 per car from the Dalton Stone Company to industries on the tracks of the Louisville & Nashville Railroad Company at Hopkinsville, but not between.

240. Then that shows that the Louisville & Nashville Railroad Company is engaged in switching between industries between the Dalton Stone Company and industries in Hopkinsville at $3.00 per car rate for that service, does it not?

A. No, I don't think it shows it, not between the various industries.

241. It shows that they are performing it from the Dalton Stone Company to these various industries?

A. On stone and screenings.

242. On stone and screenings?

A. On stone and screenings, yes.

243. I will get you to examine that book at page 353 and state what it is?

A. "Switching charges at local stations. Switching charges between locations within the switching limits on the following local stations on the Louisville & Nashville Railroad."

244. Doesn't that tariff at page 353 show that on the line of the Louisville & Nashville Railroad at Canton, Georgia they are performing switching on all classes of freight between all industries in the switching limits of Canton, Georgia for a charge of $2.00 per car switching and $3.00 per car for rental, making a total charge of $5.00 per car?

A. Yes, I would understand the tariff that way.

245. On that same page I will get you to examine the rate
144 at Cotula, Tennessee, and state if that tariff does not show that at Cotula Tennessee, coal is switched from the Southern Coal & Coke Company's tracks to the Louisville & Nashville team tracks at $5.00 per car.

A. That is the way I understand it.

246. Examine the same tariff on the same page at Cynthiana, Kentucky, and state if all classes of freight at Cynthiana, Ky., between the depot of the Louisville & Nashville Railroad and all industries having private sidings within switching limits are not switched for $1.50 per car?

A. I would understand the tariff that way.

247. Now I will get you to examine the same tariff with reference to Earlington, Kentucky, and state whether or not slack coal is not shipped from locations on the Louisville & Nashville Railroad track within the switching limits to the St. Bernard Coal Company's tracks free of charge?

A. I understand the tariff, slack coal for the manufacture of coke will be switched free from locations on the Louisville & Nashville Railroad within switching limits to the St. Bernard Coal Company's tracks.

248. I will get you to turn to page 237 of the same book and state what you find there?

A. "Switching charges between locations on the Louisville & Nashville Railroad in its New Orleans, Louisiana terminals. The Louisville & Nashville Railroad does not engage in the busines of local switching between switches, tracks, warehouses or industries in its terminals, but where any such service is performed as an accommodation the charges specified below shall be assessed."

249. Now then the charges specified there show the charge on freight between various points in the New Orleans, Louisiana Terminals to various points on all classes of freight, and shows a charge varying from $1.50 per car to $5.00 per car, does it not?

A. Yes.

145 250. Now turn to page 257 of that book, and state what that is?

A. Switching charges between switches, tracks, warehouses and industries on the Louisville & Nashville Railroad and connections with the Frankfort and Cincinnati Railway on carload traffic except as noted."

251. Now examine note #2 to that tariff and read that to the examiner.

A. Note 2. "A charge of $2.00 per car will be made for switching cars between C. S. Brent & Bros.' warehouse, South Paris, and E. F. Spears & Sons' Hemp House and the freight depot of the Louisville & Nashville Railroad and $5.00 per car between R. B. Hutchcraft and Louisville & Nashville Freight depot."

252. Turn to page 263 of that book and state what it is?

A. Switching charges between switches, tracks and industries on the Louisville & Nashville Railroad located within the Pensacola Florida yard limit.

253. Does not that tariff show that on cotton seed meal and hulls from the Southern Cotton Oil Company's plant to the recognized delivery tracks of the Louisville & Nashville Railroad Company in Pensacola yard limits a rate of $5.00 per car is prescribed?

A. Yes sir.

254. That is for switching charges, is it between switches, tracks and industries.

A. Yes sir.

255. In the yards to Pensacola, is it not?

A. That is my understanding.

256. And under the same tariff switching service is performed on turpentine in tank cars from the National Transportation & Terminal Company's yards and the Southern Warehouse & Storage Company's yards to the Standard Oil Company's yards at a rate of $5.00 per car, is it not?

A. Yes sir.

257. Did the Louisville & Nashville Railroad Company
146 ever switch, or was it ever asked to switch for the Crescent Coal Company a carload of coal from any outside point to the plant of the Keystone Mining & Manufacturing Company?

A. No sir.

258. Mr. Powell I hand you local switching order, expense bill #63275, and ask you to examine it and state what that is?

A. This is an order to switch a car of coal from the Keystone Mines to the plant of the Henderson Elevator Company, in other words, it is the order on which the car was switched.

259. Now that is the receipt from you showing the placing of the order or the performance of the service or what?

A. Performing of the service and the charge.

260. And a receipt for the charge, is it not?

A. Yes sir.

261. Now is that not the expense bill paid by the Henderson Elevator Company for that car of coal mentioned that was shipped from the Keystone Mining & Manufacturing Company to the Henderson Elevator?

A. Yes, it appears to be.

262. Is it your recollection that that date corresponds with the time that you performed that service?

A. Yes, that is about the date.

263. What is the date of that expense bill?

A. March 4th, 1908.

264. That receipt was made out in your office, and signed by you and delivered to the Henderson Elevator Company, was it not?

A. Yes sir, on the payment of the charge.

265. Now did the Crescent Coal Company have anything to do with that shipment at all for that car delivered to the Henderson Elevator Company?

A. I could not say that.

266. Is there anything on it to show that it had anything to do with it?

147 A. No, there is not.

267. Now if that was delivered to the Henderson Elevator Company for or on account of the Crescent Coal Company their name would appear upon it, wouldn't it, as the party against whom the bill was made?

A. Yes sir.

268. Will you please file that switching order or expense bill that I have handed you and make it a part of your deposition in this case, marked Exhibit #1?

A. I will, marked R. W. P. #1.

269. I also hand you local switching order, expense bill #63598, and will get you to examine that and state what it is?

A. That is the receipt for the $4.00 collected for switching L. H. & St. L. car #321, loaded with coal from the Keystone Mines to the Henderson Electric Light plant on April 15th, 1908.

270. For whose account?

A. Crescent Coal Company.

271. That shows a switching charge of $2.00 and a rental of $2.00 making a total charge of $4.00?

A. Yes sir.

272. That is for service in switching a car of coal from the plant of the Keystone Mining & Manufacturing Company to the Henderson Electric Light plant for account of the Crescent Coal Company, is it not?

A. Yes sir.

273. And for that service a charge of $4.00 was made?

A. Yes sir.

274. Please file that expense bill as part of your deposition, and mark it Exhibit R. W. P. #2?

A. I do so.

275. Mr. Powell, I hand you a paper dated Henderson, Ky., July 1st, 1908, and will get you to state whether or not that is a copy of a letter received by you from the Keystone Mining & Manufacturing Company on that date?

148 A. Yes, I believe that to be a copy of the letter.

276. Will you please file that with the examiner, and mark it R. W. P. #3?

A. I do so.

277. I hand you a copy of a letter dated July 13th, 1908, written to you by the firm of Clay & Clay, as attorneys for Mr. Jo. Higdon, and will get you to examine that letter, and state whether or not you received the original of which that is a copy?

A. I received a letter from Clay & Clay similar to that, and I believe that is a duplicate of the one I received.

278. Have you the original letter of which that purpo-ts to be a copy?

A. No sir, I have not.

279. Do you know where that letter is?

A. No sir, I don't. That letter was sent to Capt. Howell's office, the General Freight Agent at Evansville.

280. Have you seen the original of that letter since you sent it to Capt. Howell's office?

A. No sir, I have not.

281. Your recollection is that that is a copy of the letter?

A. Yes.

282. Will you please file that copy, and mark it exhibit R. W. P. #4?

A. I do so.

283. I hand you a letter dated July 16th, 1908, addressed to Messrs. Clay & Clay, and signed by you as agent, which purports to be an answer to our letter of the 13th of July. I will get you to examine that and state whether or not you wrote it?

A. Yes, that letter was written by me.

284. I will get you to file that letter as part of the your deposition, marking it Exhibit R. W. P. #5?

A. I do so.

149 285. Attached to the deposition of Mr. Jo Higdon in this case is an exhibit, #3, which purports to be a copy of a letter

written by Mr. Higdon to you on July 2nd. Will you please examine that letter and state whether or not it is a copy of a letter that you received at that time?

A. Yes, I think that is a copy of a letter I received from Mr. Higdon on that date.

286. Examine Exhibit #4 and state whether or not that is the original of a letter written by you to the Crescent Coal Company on July 3rd, 1908?

A. Yes sir; that is the original of the letter written by me.

287. Please examine Exhibit #5 dated July 1st, 1908, Exhibit #6 July 13th, 1908, Exhibit #7 dated July 7th, 1908, exhibit #8 dated July 16th, 1908, and state whether or not those exhibits are originals and copies respectively of correspondence had between you and the Crescent Coal Company or Mr. Jo Higdon on the respective dates shown above?

A. These exhibits are either the originals written by me or duplicates of those written by Mr. Higdon to me.

288. Now examine Exhibit #9, filed with the deposition of Mr. Hidgon, and state whether or not that is a copy of a communication written by Mr. Higdon to you as agent of the Railroad Company, which was delivered to you, and whether or not at the time of the delivery of that communication Mr. Higdon tendered you $4.00 in money.

A. I have no recollection of ever seeing this letter before, and do not recall that Mr. Higdon tendered $4.00 for performing the services mentioned in this letter.

289. Can you say that he did not do it?

A. I have no recollection of it.

290. Do you know whether he tendered it to any one else in the office?

A. No sir, I never heard of it if he did.

291. How long have the Louisville & Nashville Railroad Company and the Crescent Coal Company been doing business with each other?

150 A. Three or four years I think.

292. How long had the Crescent Coal Company been engaged in the coal business in the city of Henderson on July 1st, 1908?

A. I don't know, but I believe about two years.

293. During the two years preceding the 1st day of July 1908, had it not shipped and received a good deal of coal over the Louisville & Nashville Railroad Company?

A. They had received a good deal of coal over the L. & N. but had not shipped any.

294. That coal was received the freight to be collected from the Crescent Coal Company, was it not?

A. Yes.

295. Charged to the Crescent Coal Company was it not?

A. Yes sir.

296. Now in its business dealings during the two years preceding

July 1st 1908 was the business of the Louisville & Nashville Railroad Company transacted on a cash basis or on a credit basis?

A. On a credit basis.

297. The bills would be charged to the Crescent Coal Company and at stated intervals you would make out bills for the amount and present it to the Crescent Coal Company, and it would then pay the whole bill, would it not?

A. Yes sir.

298. After July 1st, 1908 it continued to do business with the Crescent Coal Company did it not?

A. Yes sir.

299. Wasn't its business after July 1st 1908 transacted on the same basis?

A. It was.

300. During the period before or after July 1st, 1908 if the Crescent Coal Company ordered a car to be loaded with coal and shipped to any point outside of the switching limits of the city, the Louisville & Nashville Railroad Company would furnish
151 that car and did furnish that car, did it not, notwithstanding the rate wasn't paid in advance, and regardless of whether the rate was paid in advance?

A. Yes, they would.

301. In other words, extending over a period of two years prior to the 1st day of July, and almost two years since the 1st day of July 1908, the business between the Crescent Coal Company and the Louisville & Nashville Railroad has been done on what might be termed a credit basis?

A. Yes sir.

302. A demand of cash in advance was never made by the Railroad Company?

A. No sir.

By Mr. MOORMAN:

303. Mr. Powell, did Mr. Higdon ever prior to July 1st, 1908 or subsequent to that time that you now recall, order a car of coal to be shipped out of Henderson?

A. No sir.

304. His business was confined to the City of Henderson?

A. Yes sir.

305. And the coal was shipped to him to be distributed and sold in the City of Henderson?

A. Yes sir.

306. He was not selling coal outside of the city of Henderson so far as you know?

A. At least he wasn't bringing coal into Henderson and shipping it out of Henderson.

307. At the time that Mr. Higdon or the Keystone Mining & Manufacturing Company made the request of you to deliver the cars of coal to the Elevator Company or the Lighting Company that you have referred to, and at the time you made that delivery,
152 did they inform you that the order for the coal had been cancelled by the person who had originally ordered it.

A. Yes sir.

308. Were the cars originally placed to be loaded and transported to some point outside of Henderson?

A. They were.

309. At the time of placing these cars that you have referred to, did you know that these cars were to be switched to the Henderson Elevator Company or to the Lighting Company?

A. No sir, they were placed there with the understanding that they were to be loaded to Owensboro.

310. And after they were loaded they telephoned you that the order has been cancelled and asked you to transfer those cars to the Elevator Company and the Lighting Company?

A. Yes sir.

311. And on that request you switched the cars and charged the rate provided for in the tariff for switching?

A. Yes sir.

312. What business is Marshall & Alves engaged in?

A. Coal, sand and grain.

313. Do they receive shipments of grain from points outside of Henderson?

A. They have received grain from points outside of Henderson, but I don't believe they have done any grain business at all in the last year or two.

314. At the time they were engaged in the grain business did they receive shipments of grain from points outside of Henderson?

A. Yes sir.

315. Did they ship grain from their place to points out of Henderson?

A. Yes sir.

316. Were they simply engaged in the purchase and sale of grain without grinding or crushing it?

153 A. Yes sir, buying and selling.

317. You speak of switching cars from the yards of R. A. Powell to plants in Henderson: Did this company at any time switch cars that were loaded at Powell's yards or did they switch the cars that came into Powell's yards from points outside of the city of Henderson?

A. There have never been any cars switched from Powell's yard that were loaded at his yard. The cars switched from his yards to other industries had previously been received from the Louisville & Nashville Railroad, from off the line.

318. What business was the Anderson Box & Basket Company engaged in?

A. The manufacture of wood slat boxes and baskets.

319. At the time that you offered to the Crescent Coal Company the rate of fifty cents, did you offer that as a switching rate or as a transportation rate, such rate as the other coal companies in that vicinity were paying on shipments of coal from their mines to plants in Henderson?

A. It was offered as a transportation rate, the same rate that was applicable from the nearest mines to Henderson.

320. You say there was no provision in the tariff for giving such a rate. There was a provision in one of the tariffs for a rate on coal from points in a certain territory to Henderson, was there not?

A. I think so.

321. What was that?

A. Fifty cents per ton.

322. Is that territory blanketed?

A. Yes sir; that rate covers all mines I believe on the Henderson Division and branches.

323. And you offered the rate to the Crescent Coal Company that the other coal companies and mining companies in that
154 blanketed territory were paying for the transportation of coal from their mines to plants in Henderson?

A. Yes sir.

324. That rate was published at that time, wasn't it, the blanketed rate, the fifty cent rate?

A. Oh yes. I don't know that that rate was effective.

325. You don't know whether the rate from other mines to industrial plants in Henderson was published at that time?

A. Yes sir, I know what those rates were, but I don't know whether the same rates were published to apply from the Keystone mines.

326. I believe you said this was not offered as a switching rate, but as a transportation rate?

A. Yes, as a transportation rate.

327. What business is the Henderson Elevator Company engaged in?

A. Handling, buying and selling grain.

328. Grinding it or not?

A. No, just elevating and drying it.

329. What business is Waller & Company engaged in?

A. They handle grain in the same manner as the Henderson Elevator, and they also have a mill, a feed mill, manufacture feed.

330. What business is the Sandifer Mill engaged in?

A. That is a rolling mill.

331. Grinding grain.

A. Yes sir.

332. Did they ship or purchase corn from points outside of Henderson, and after they manufactured it they shipped the manufactured product to points outside of Henderson?

A. Some of it.

333. What was done with those carloads of cobs that came in?

A. They were ground by Waller in the feed mill.

334. Shipped to other points?

155 A. Shipped to Eastern cities.

335. Shipped to Eastern cities?

A. Yes sir.

336. What business is the city mills engaged in?

A. Manufacture of flour, making flour and meal?

337. Where do they ship?

A. To the south and southeast, to points beyond the L. & N. tracks.

338. Do Marshall & Alves ship sand?

A. Yes.

339. What points do they ship to?

A. To stations on the L. & N. south of Henderson.

340. Where do they get their sand?

A. From the Ohio River I believe.

341. In the city of Henderson?

A. Just below the city of Henderson.

342. Outside the city?

A. Yes sir.

343. At the time the Illinois Central Railroad Company delivered to the Louisville & Nashville Railroad Company empty cars that you have referred to, to be switched to the plant of the Keystone Mining & Manufacturing Company, and to be returned to the interchange track of the Illinois Central Railroad Company, did you know that any of those cars after they were loaded by the Keystone Mining & Manufacturing Company were to be delivered to industrial plants in Henderson?

A. No sir.

344. Did you know at the time they were switched back from the mine of the Keystone Mining Company to the interchange track of the Illinois Central Railroad that they were to be delivered to another industrial plant in Henderson?

A. No at the time the service was performed I did not
156 know where they were going.

345. At the time of the performance of this service did you charge the service to the Illinois Central Railroad and undertake to collect it from the Illinois Central Railroad?

A. Yes sir.

346. Was it after the performance of this service that the Illinois Central Railroad Company informed you that you would have to collect from the Crescent Coal Company?

A. Yes sir.

347. Referring to switching order #63598, L. H. & St. L. car #32, contents coal, switched from the Keystone mine to the Henderson Elevator Company on May 15th, 1908, at the time that this car was ordered by the Crescent Coal Company were you informed by that company that the car was to be switched to the Henderson Elevator Company or were you informed that the car was to be shipped to some other point outside of Henderson?

A. When the car was ordered to be placed for loading?

348. Yes.

A. I was informed it was to be loaded for Owensboro.

349. When did you first learn that the car would not be shipped to Owensboro with reference to the time of the loading of the car?

A. Several days after the car had been loaded.

350. Who informed you then?

A. The Keystone people.

351. Did they make any request of you?

A. As well as I recall we asked them why the car was being delayed under load, and they advised us that the Owensboro people had turned it down, and said they did not know what they were going to do with it, and after they disposed of it to the Henderson Elevator Company, and the request to switch it was made both by the Crescent people and the Keystone Mining Company.

352. Referring to switching order #63,275, L. & N. car
157 380, I believe, contents coal, switched from the Keystone Mining & Manufacturing Company mine to the Henderson Elevator on March 4th, 1908, at the time that request was made to place that car at the mine of the Keystone Mining Company were you informed that the car was to be loaded with coal and delivered to the Henderson Elevator Company?

A. No, I was informed that the car was to be loaded to a point out of the city.

353. Acting on that information did you furnish the car?

A. I did.

354. When did you first learn that the car was not to be shipped out of the city with reference to the time of loading it?

A. I don't recall about that.

355. Was it after the car was loaded?

A. It was after the car was loaded, yes.

356. Why was that car delivered to the Henderson Elevator Company?

A. Because they could not ship it out of the city, and in order to release the car and to accommodate the Keystone people we switched it to the Henderson Elevator Company.

357. You seem to have that charged to the Henderson Elevator Company. Why is that?

A. That car was switched on request of the Henderson Elevator Company, and was switched for them.

358. Who ordered the placing of that car at the mine for loading?

A. The mine people. I don't recall just who.

359. How did you happen to give Mr. Higdon a copy of the statement of the coal consumed in Henderson annually?

A. That statement was compiled for a travelling freight agent of ours I believe, and in order to get the information I had to consult with the various coal agents, among whom was Mr. Higdon, and he asked me to give him a memorandum of the statement after I had completed it.

158 360. And you gave it to him?

A. I did, yes sir.

361. Will you read that letter, I can't make it out Mr. Powell?

A. "Kindly place me two L. & N. eighty thousand capacity cars to be loaded with coal, shipment to be made to A. Waller & Company and Henderson Elevator Company."

362. You have been asked to refer to the tariff which was filed with the deposition of Mr. Higdon, and to explain certain notes and statements therein on pages 133, 353, 237, 257, and 263. Are you a tariff man, or do you in the course of your employment with the Railroad Company have anything to do with the making of rates

and the publishing of a tariff for the handling of coal and other commodities?

A. No sir. I have no knowledge whatever of how tariffs are compiled, or on what basis, or how they are made, never had any experience in that line.

363. You know nothing about the reason for publishing certain tariffs or making certain switching arrangements further than at your own station, do you?

A. Nothing whatever.

364. You know nothing about the station at Hopkinsville with reference to the switching service that the company performs there, and whether it is performing any service?

A. No sir.

365. Do you know anything about the station at Cynthiana with reference to the switching service performed there, if the company performs any?

A. No sir, I do not.

366. Do you know anything about what service the company performs at either of those places or any places that you have spoken of in your cross-examination except as is shown by the tariff that you have referred to and been asked about?

A. No sir, I have no knowledge whatever about it.

159 By Mr. CLAY:

367. What experience have you had in the railroad service?

A. I have had experience in telegraphing, handling accounts, chief clerk and yard worker.

368. How many years' experience?

A. About twenty years.

369. Covering how many years?

A. Covering twenty years.

370. While you know nothing about the basis upon which freights are formulated, from your experience as agent and the examination and consultation of tariffs, you are, are you not, able to tell what a published tariff means and can construe that tariff?

A. Yes, I think so.

371. Now on cross-examination you said with reference to the cars that were loaded at the Keystone Mines and switched to the Henderson Elevator Company and the Electric Light Plant, that you knew nothing about to what representative of the company the orders to place the car were given, and did not know what representative of the Keystone Mining Company gave the orders except what was shown by your books. That is true, is it not?

A. Yes sir.

372. So when in redirect examination you say that the order was given to place the car for shipment to Owensboro you are only speaking from what your books show, and not from anything you know personally about it.

A. I can't say whether the request was made, on redirect, but I do know it to be a fact, because cars were not furnished to the mining people without my authority.

373. You know nothing except what your books show or what

somebody in your office told you the Keystone Mining Company had communicated to them?

A. Or what was said to me personally that I can't recall.

160 374. Or who said it to you personally you can't recall?

A. No.

375. Now on redirect examination you stated that the rate of fifty cents that you quoted was not a switching rate but was a transportation rate. I will get you to examine the letter which you wrote on July 16th, 1908 jointly to the Keystone Mining & Manufacturing Company and the Crescent Coal Company, which you have identified as a letter written by you, and state if in that letter you do not head it "Switching coal within yard limits at Henderson, with reference to furnishing Keystone Mining & Manufacturing Company with cars for movement of coal from that plant to the various industrial plants within the city of Henderson. Please understand that we will furnish cars for this movement on basis of fifty cents per ton". That is the letter you wrote is it not?

A. That is the letter, yes.

376. That is the letter you wrote, is it not?

A. Yes sir.

By Mr. MOORMAN:

377. Mr. Clay has asked you Mr. Powell, if you could not construe a tariff when you read it. You construe it as it is written don't you, like you construe any other English?

A. Yes sir.

378. At the time that these two cars were furnished to the company could they have been furnished to the company without your authority?

A. No sir.

379. Was any one in your office authorized to have those cars switched there without your authority?

A. No sir, they were not.

380. Was any one authorized to have those cars switched there if the Mining Company or the Crescent Coal Company stated at the time they requested the cars that they were to be loaded and

161 delivered to an industrial point in Henderson?

A. No. In fact the office force had instructions not to furnish the Keystone mines with any cars for switching purposes.

By Mr. CLAY:

381. Did any one in your office have authority to order the placing of cars during your absence?

A. For shipment, yes sir.

382. You don't mean to say that every car that was placed was placed under your personal direct order given at the time that car was placed?

A. No sir, I didn't mean to leave that impression.

383. The Chief Clerk in your office has authority to place cars without a direct order from you, has he not?

A. He has.

384. The same kind of orders that you have, so far as the placing of cars is concerned?

A. Yes.

By Mr. MOORMAN:

385. But neither he nor you had authority to place those cars or any car at the Keystone Mining & Manufacturing Company's plant to be loaded with coal to be delivered to an industrial plant in Henderson at that time?

A. No sir.

386. And you had so instructed him and all your office force?

A. Yes sir.

387. And you were not informed at the time that these cars were placed there that they were to be delivered to any plant in Henderson, but either you or some member of your office force was informed that they were to be transported to Owensboro or
162 some point outside of Henderson?

A. Yes sir.

Also the deposition of C. B. Compton, taken at the same time and place, and for the same purpose, said deposition being taken in rebuttal.

C. B. COMPTON, being first duly sworn, was examined by Mr. Moorman, and testified as follows:

1. Mr. Compton, what position do you hold with the Louisville & Nashville Railroad Company?

A. I hold the position of Traffic Manager of the Louisville & Nashville Railroad Company.

2. As Traffic Manager of the Louisville & Nashville Railroad Company, is it your duty to fix the rates on shipments of traffic over the system and between all points on the system?

A. Yes sir, aided by the General Freight Agents, reporting to the office of the Traffic Manager. All rates which they make are subject to the approval of the Traffic Manager. Rates cannot be made effective according to our organization without the approval of the Traffic Manager.

3. Did the Louisville & Nashville Railroad Company ever put in a rate at Henderson for the shipment of coal in carload lots or otherwise from the mining plant of the Keystone Mining & Manufacturing Company to industrial plants within the switching limits of Henderson?

A. No sir, the Louisville & Nashville Railroad Company has never established a rate for the transportation of coal from the mines of the Keystone Mining Company to any point in the city of Henderson, whether it be to an industrial plant or a team-track or any other delivery. About five years ago when the question came up, with regard to the development of coal on the property now operated as a coal mine, a Mr. Nicholson came to see me at Louisville, and asked me the question what rate or what arrangement are you willing to make for the movement of coal by car from
163

the proposed opening of the coal mine to points in the City of Henderson, and I told him we were not engaged in the movement of property in competition with teams or the driving of livestock, and that we could not consistently make him any rate whatever, and that he could not depend upon the railroad company providing such service.

Plaintiff moves to strike the foregoing answer except the first sentence thereof.

4. Was that conversation had with Mr. Nicholson prior to putting in of the sidetrack at the plant of the Keystone Mining & Manufacturing Company?

A. Yes sir.

5. And Mr. Nicholson was then the manager or an official of the Keystone Mining & Manufacturing Company?

A. Yes sir, he represented the owners of the property and was interested himself according to my information. He was the expert selected to develop the property.

6. Mr. Compton, Mr. Howell of Evansville authorized or undertook to authorize Mr. Powell, the agent of the Company at Henderson to offer to make the Crescent Coal Company or to the Keystone Mining & Manufacturing Company a rate of fifty cents a ton for the transportation of coal from the mine of the Keystone Mining & Manufacturing Company to industrial plants in the city of Henderson. Was that rate submitted to you prior to the attempt on the part of Mr. Howell to authorize the putting in of that rate?

A. No sir; when my attention was called to that matter I expressed surprise that he would undertake to advise the Agent at Henderson that he might quote a rate of fifty cents per ton. The rate was never established. It never became effective. It was
164 simply a tentative offer. When it came to my attention I ordered and gave instructions that the rate should not be established; that I had already advised Mr. Nicholson and the people who owned the property of the Keystone Company that we would not engage in that character of business.

7. What is a switching service, Mr. Compton.

A. A switching service is an auxiliary service to transportation service. Transportation service is better explained by illustration. If a shipment say should move from Nashville, Tennessee to Henderson Kentucky, consigned to a consignee having an industry on the railroad track, and it was served by that track, the service from Nashville, Tennessee to Henderson would be transportation, and the switching from the yards or the tracks of the railroad to the industry would be switching, and that is auxiliary to the transportation service. It would be the same if the business moved in the opposite direction. It would be the same if the industry was located on some other line. A movement between two points within the limits of a city is not switching.

8. Switching service then either precedes or succeeds a transportation service?

A. Yes sir.

9. The movement of freight from the mine of the Keystone Min-

ing & Manufacturing Company to an industrial plant within the switching limits of the city of Henderson would be what kind of service?

A. It would be transportation service if we engaged in it.

10. Has the company ever engaged in that service?

A. No sir.

11. Has it ever held itself out as engaging in that service?

A. No sir.

12. Has the Company ever switched for Marshall & Alves and for the Henderson Elevator Company, for A. Waller & Company and other grain elevators and milling companies in Henderson, grain between the River track and those plants, or between
165 the elevators and the mills, and if so why is the company engaged in that service, and what kind of service is it?

A. The Louisville & Nashville Railroad Company has at Henderson I think, and other Ohio River crossings endeavored to upbuild the grain and milling interests. It has by milling in transit arrangements at Henderson undertaken on grain from the territory north of the River to arrange for milling in transit and reshipping at though rates from the north bank of the Ohio River. It has likewise undertaken to provide facilities at Henderson whereby grain may move from the Ohio River landings and its tributaries, and bring the grain from its river facilities to the elevators in the city of Henderson, from which it is reshipped to the south in the shape of grain, and it has undertaken to move such business to the mills at Henderson, there to be converted into mill products and reshipped to the south. It has likewise moved grain from an elevator to the mill as an auxiliary to the transportation from the mill to the south in the shape of mill product. Such business as has moved in the shape of grain or grain products or other products which may be converted into mill products has been done as an auxiliary to the through shipment, under milling in transit arrangements.

13. Is the milling in transit arrangement, such as exists at Henderson authorized by the tariff of the Louisville & Nashville Railroad Company?

A. Yes sir.

14. Does that arrangement apply to the Peerless Distillery Company in the movement of grain to that company to be converted into products of that company, to be shipped outside the city of Henderson?

A. The Louisville & Nashville Railroad has tried to encourage the manufacture of grain products, and that is a grain product. This was handled under the same arrangement as the ar-
166 rangement for the milling of food stuffs.

15. If sand or other products or rock are shipped in to Henderson to a dealer in those products, and the car is ordered by the dealer to be placed at some industrial plant in the city of Henderson, is that a movement authorized under our traffic, and is the switching of the car from the concern or in placing the sand or rock an auxiliary movement to the transportation to that place?

A. I assume that you refer to a shipment to the city of Henderson by the Louisville & Nashville Railroad of a carload of some commodity. The Louisville & Nashville Railroad would place that car at the Henderson rate at any point in the city of Henderson that it reached with its own rails. The movement from the break-up yard to the delivery track would be the switching movement, or an auxiliary to the transportation service, and likewise it would be an auxiliary to the transportation service if it was delivered on the Illinois Central track or on some other track.

16. Does the milling in transit principle apply to any other raw material such as logs that are to be cut into lumber, &c.

A. We have no arrangement of that sort at Henderson. There are arrangements like this: where after the timber has been cut in Kentucky, Tennessee or in other southern states, it has to be cut over, and it is not in such quantities as to justify the location of a saw mill to cut it, the railroad has encouraged the movement of the logs into the saw-mill, and under through arrangements for the purpose of gathering up the scattered timber and having it converted into merchantable condition and disposed of under an arrangement whereby the through rate is undertaken to be protected as near as it is possible to do so. All such arrangements of that sort are on file with the various commissions of the states through which the Louisville & Nashville Railroad Company traverses, and also with the Interstate Committee Commission, and they are in a measure like the milling in transit of grain.

167 17. On page 133 of the Terminal Tariff of the Louisville & Nashville Railroad Company issued April 1st, 1908, Rates, Rules and Regulations governing switching of cars at Hopkinsville, Kentucky, are set out. I wish you would examine that Mr. Compton, and state what switching arrangements are authorized under that publication?

A. This tariff authorizes the placement of a car received at Hopkinsville by the Louisville & Nashville Railroad Company to the industrial sidings, likewise it authorizes the movement from the industrial sidings to the railroad for movement from Hopkinsville to its shipped destination. It authorizes upon the request of the shipper or consignee cars arriving at Hopkinsville by the L. & N., to be placed upon switches, tracks, warehouses or industries reached by or connected with the tracks of the Louisville & Nashville Railroad Company or portage railroad, and such placement and delivery shall constitute delivery of freight to the consignee.

18. The tariff that you refer to is not in effect?

A. It has been superseded by I. C. C. #A-9938 March 27, 1910, issued February 21, 1910, and contains this clause:

Plaintiff objects to the clause of the tariff of 1910.

"The Louisville & Nashville Railroad does not engage in the business of local switching between switches, tracks, warehouses and industries in Hopkinsville, Kentucky Terminals, but where such service is performed as an accommodation a charge of $2.00 per car switching plus $4.00 per car car rental shall be assessed, except

as shown below." The exception in this case is identical to the exception in the original, and it refers to the movement of stone from the Dalton Stone Company, of carloads of stone and screenings to the tracks of the Louisville & Nashville Railroad Company in Hopkinsville at a charge of $3.00 per car. That rate is issued for the purpose of taking cars of the stone used by the municipality of Hopkinsville, Kentucky in making their streets and roads.

19. Is that service performed for any other purpose except
168 that the rock may be used on the streets of the municipality of Hopkinsville?

A. That is my understanding.

20. Does the Company do that kind of service for municipalities and for the public at times?

A. The railroad has for years encouraged the building of good roads, and has shown a great deal of interest in the building of good roads in the territory that it traverses, and has always been willing to make reduced rates for the betterment of the county and state roads. It has received thanks often from the various states for liberality in that respect, lately from the State- of Illinois and Virginia.

21. Under this tariff with the exception of the service performed in switching cars of stone in the city of Hopkinsville to be used in building streets, did the Louisville & Nashville Railroad Company engage in any switching in the city of Hopkinsville, except as an auxiliary to the transportation service.

A. This is not a switching arrangement at all. This is a transportation charge. We transport the property at $3.00 a car. We don't switch it for anybody.

22. Did the Company at the time this tariff was in effect, the first tariff that I referred to, the tariff effective April 1st, 1908, perform any switching service in the City of Hopkinsville, and had it the right under that tariff to perform any switching service in the city of Hopkinsville except as an auxiliary to the transportation service?

A. No, sir, it did not sir.

23. I will get you to refer to page 353 of the Terminal Tariff which was filed with the deposition of Mr. Higdon as Exhibit J. H. #10, and explain what if any service the Louisville & Nashville Railroad Company performed at Canton Georgia.

169 A. At Canton Georgia there is located large marble quarries and sawing plants where marble is shaped up for shipment to various points in the United States. Canton, Georgia is a small town of no importance other than that developed through the mining and Manufacture of Georgia marble. The marble is moved to the saw-works and shaping-up plants, as an auxiliary to the through movement to destination, wherever the property is sold. The movement in respect to the marble at Canton is the same as the movement at Henderson with respect to grain from the Ohio River to the milling plants.

24. Please refer on that page to the Cynthiana arrangement or tariff and explain that?

A. Cynthiana, Kentucky Tariff rates, page 353. "All classes of freight between the depot of the Louisville & Nashville Railroad and all industries having private sidings within the switching limits $1.50 per car." Industries at Cynthiana, Ky. are served by side-tracks or switches connected with the Louisville & Nashville Railroad. Cynthiana is a local station on the Kentucky Division of the Louisville & Nashville Railroad and no business moves inward or outward at that point except by the Louisville & Nashville Railroad. $1.50 per car is an auxiliary charge to the transportation service on inward and outward business, and is in addition to the charge for the transportation.

25. Does that tariff authorize, or has the Louisville & Nashville Railroad engaged at any time in moving cars between two industrial plants in the City of Cynthiana where there was to be no outward or no transportation movement to it?

A. No sir there has been no movement between any two industries in the city of Cynthiana.

26. Refer on the same page to Cotula, Tennessee.

A. Cotula, Tennessee is located on the new line of railroad constructed from Saxton, Tennessee, to Knoxville, Tennessee, in what is called The Narrows of Cumberland Mountains. The Nar-
170 rows is a mountainous gorge through which the Clear Fork of the Cumberland River passes, and it is so rocky and rough that it was almost impossible to penetrate it with a railroad. The coal in that section lies rather high in the hills or mountains. Dr. Catliff of Williamsburg, Ky., developed a coal mine at that place called Catliff. The new name is Cotula. It is a gorge in the mountain. The mine tipple is not at the village or the mining camp. The tipple is inaccessible by any means of transportation whatever for the movement of coal from the tipple to the mining camp to keep the miners warm, and in order that this property might be successfully operated the Railroad Company did, for a transportation service charge $5 per car for moving the coal from the tipple to the mining camp; otherwise they would not have had any coal to use. That was to my mind a justifying reason for the establishment of a transportation charge of $5.00 per car, which was from the coal company's property to the coal company's property for the purposes named.

27. Please refer to page 237 of the same tariff and explain the service the Louisville & Nashville performs at the city of New Orleans.

A. Page 237 of the Terminal Tariff of the Louisville & Nashville Railroad shows the rate and charges per car between locations on the Louisville & Nashville Railroad in its New Orleans terminals, and between the L. & N. terminals and indicated connecting line junctions. It provides that "the Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks warehouses or industries in its terminals, but where such service is performed as an accommodation the charges specified shall be assessed." In the first section showing the origin of the property the name L. & N. Wharf, head of Caliope Street is used.

That is the wharf on the Mississippi River at the foot of Caliope or Julia Street, and business arriving at New Orleans by fresh water rivers or by sea and river is deposited at that wharf and moved to the industry on the L. & N. track, just the same as the property is moved from the wharf boat at Henderson to the industry
171 in the city of Henderson. The conditions surrounding the handling of property at New Orleans is identical to that at Henderson.

28. Does the Louisville & Nashville Railroad Company now engage or has it ever engaged in the business of transporting carloads of product from one industrial plant in the city of New Orleans to another industrial plant in the city of New Orleans when the same is not an auxiliary movement to a transportation service?

A. No sir.

29. I will get you to refer to page 257 of the same tariff showing the charges at South Paris, Ky., and explain what that tariff authorizes?

A. Page 257 of the Terminal Tariff of the Louisville & Nashville Railroad applicable at Paris, Ky., provides that the rates apply as per note 1 to and from certain industries, which I do not understand is questions; but the tariff rate applies inward and outward. Note #2 says "A charge of $2.00 per car will be made for switching cars between C. S. Brent & Bros.' warehouse, South Paris, and E. F. Spear & Sons' Hemp House and the freight depot of the Louisville & Nashville Railroad, and $5.00 per car between R. B. Hutchcraft and the Louisville & Nashville Freight depot." It does not say that switching will be performed between C. S. Brent & Company's warehouse and E. F. Spears & Sons' Hemp House, nor does it say that any switching will be performed between any two industries in Paris, Kentucky, but it does say that certain charges will be assessed for the movement of property by car between the depot of the Louisville & Nashville Railroad Company and these three specific industrial plants. And such business moved under this tariff is auxiliary to the movement to and from Paris, Ky., of traffic handled by the railroad.

30. Has the Louisville & Nashville Railroad Company ever engage- and does it now engage in switching cars between the three industries mentioned in the tariff.

172 A. No sir.

31. Is it authorized by this tariff to engage in that?

A. No sir.

32. Or between any industries at Paris?

A. No sir.

33. I refer you to page 263 of the same tariff relative to the Terminals at Pensacola, Florida. Please explain that.

A. Pensacola, Florida is located on the Pensacola Bay, which is an arm of the Gulf of Mexico. It has developed into quite an important exporting and importing port. Business inward from foreign countries, and business inward from the Gulf of Mexico, and by the Gulf of Mexico from the fresh water streams is received at the wharves and moved from the wharves by the car to the indus-

trial plants within the town limits of Pensacola, and business from foreign countries is handled in the same manner. Later the property — moved outward from Pensacola to market, sometimes by rail to the east and north, and sometimes by rail and water. It has movement outward continuously. The movement from the wharves or to the wharves is an auxiliary to the transportation service at New Orleans in the same way that the movement at Henderson Kentucky is an auxiliary to the transportation service.

34. Does that tariff authorize, Mr. Compton, or has the Louisville & Nashville Railroad Company ever engaged, or does it now engage in moving freight between two industries in Pensacola, where that movement is not an auxiliary to a transportation movement?

A. No sir. It is always an accommodation.

35. How is the situation at Pensacola with reference to the station at Henderson?

A. Why the situation is alike, and provided for alike in the terminal Tariff.

36. Mr. Compton, Mr. Powell testified that the rate on coal from Henderson, Ky., to Evansville, Ind., was two cents on the
173 hundred pounds. Is his testimony on that point correct?

A. We have a conflict in our tariff from Henderson to Evansville. The rate on coal to Henderson from mines on the Henderson Division is fifty cents. The measure of that rate is the competition in the Ohio River from the mines on the Illinois Central and mines on the L. H. & St. L. road. The rate to Evansville is the same, fifty cents per ton. The measure of the rate from there is the competitive force exerted in the Ohio river and mines located within the town limits of Evansville, and also mines on the Southern Railway in the vicinity of Huntingburg, Indiana. When Mr. Nicholson came to me to establish rates from Henderson to the markets in Henderson I quoted him the same rate to Evansville as existed at that time — mines on the Henderson Division, fifty cents, and I gave instructions to have that rate issued, and it was issued. But it seems that a rate of two cents per hundred pounds was also in effect, and there is a conflict between the two rates. That explains the difference between the rate ordered by me and the existing rate of two cents named. They are both in effect, and there is a conflict as to which is right. The fifty cents rate is the reasonable rate to charge.

37. What was Nicholson's business at the time of your conversation with him?

A. He was an expert coal man who had been engaged in mining coal in Pennsylvania. He showed me that he had eastern parties interested with him or about to become interested with him in the development of what he called a good piece of coal property in Henderson.

38. In the several conversations which you had with him he was the General Manager of that mining company?

A. Oh yes; I have had frequent conversations with him, and in fact I have had correspondence with people who said that he represented them. There isn't any question about Mr. Nicholson's de-

veloping the property down there for the owners and being
174 interested himself.

39. You mean the Keystone property?

A. That became its charter name.

40. That is its charter name?

A. Yes sir.

41. Has the Louisville & Nashville Railroad Company at any time moved grain or cobs from one of the elevator companies at Henderson to a milling company, dumped it out at the Milling Company for a charge of $2.00 a car for the service and $2.00 a car for car rental?

A. Whether or not any business has been moved under that tariff or not I don't know, but if it has, it has not been moved improperly, for the reason that those cobs are like grain converted into feed and sold all over the south. I have in the last fifteen years arranged to move thousands of carloads of corn cobs from Henderson, Ky. to Columbia, Tenn., there to be milled into feed, for re-consignment thence to the south. Now whether or not they mix at Henderson now, under the pure Food Laws as they did before, I don't know, but it would be as proper to move a carload of cobs for milling purposes as it would be a car load of corn for milling purposes.

Cross-examined by Mr. CLAY:

42. Mr. Compton, under what tariff and under what arrangement is it that if a barge of corn is received at the Henderson wharf, and is delivered to one of the Henderson elevators you charge $2.00 a car switching, but if that same car is put at Marshall & Alves' plant for instance, there to be loaded with corn and delivered to the Henderson Elevator, you charge $2.00 per car for switching, plus $2.00 per car rental of the car.

A. The tariff applies to Marshall & Alves the same as to the Henderson Elevator Company, and the same conditions apply from the wharf to their respective places of location in Henderson, at the same rate.

175 43. That is not the question. My question is, under what tariff is it that you charge a switching rate of $2.00 per car from the wharf at Henderson to one of the elevators, whereas you charge $4.00 a car from one of the elevators to another elevator.

A. As I stated before, our charges from the wharf-boat to the industries on our line are like to all. The movement of a car from an elevator to the grain house of Marshall & Alves is a different movement. Now for that we charge when we perform that service $2.00 plus $2.00, making $4.00.

44. Well now, why is it that you charge $4.00 for that service and only $2.00 for the other service. Doesn't the Railroad Company get the same benefit, if your rate is based only on the milling in transit business, doesn't the railroad company get the same benefit when a car is hauled from the river to one of the elevators and shipped out that it would get if the grain was hauled from one of the elevators to another elevator and shipped out?

A. Well, you must take this into consideration. When you move the grain from the wharf boat to the elevator that one movement should constitute all the movements necessary for the conduct of the reshipping business from the Ohio River landing to the south. Now if after a car has been moved from the wharf into the elevator, and we are asked again to move from an elevator to another elevator, you would have circumstances to arise or circumstances arising that would not justify the second movement at the same price as the first movement, and I think the difference in those circumstances justifies a difference in the charge.

45. What are the differences in the circumstances, the difference in the circumstances. You already had one movement.

A. We can't move property time and time again as an accommodation.

46. Does the Railroad Company in the milling business or in the transportation of the grain move from one industry to another only the grain that has been brought to that industry by the

176 Railroad Company?

A. That is impossible of a true and concise answer for this reason: When grain is put into an elevator and mixed, river grain and rail grain and wagon grain in the same bins, it is absolutely impossible to separate it after that has once been done, and for that reason you can't tell whether or not the same grain that moved in moves out.

47. You can, Mr. Compton, though, tell that the same quantity of grain that moved in moves out, can you not?

A. Well yes, yes sir.

48. Now, isn't that the basis of your milling in transit arrangement, that when grain is shipped in to a place for rehandling and is afterwards shipped out within a given time, the theory is, is it not, that the same quantity of grain that has been shipped in, or not exceeding the same quantity of grain that has been shipped in, is shipped out is it not?

A. I will have to qualify that answer in this way: The milling in transit and re-shipping rules provide that the equivalent of the in bound movement shall be shipped out, in order to get the benefit of milling in transit. That is to say that on grain you ship out it is pound in and pound out. In mill products it is the equivalent in the finished product of the inbound business less the wastage. That is reshipping and milling in transit on true basis. Here we have a movement at so much per car between certain points, not based on poundage, but based on the movement for a car, or charge for the movement of the car. Now as I said awhile ago, the movement of that car at a charge per car from the river to the elevator, or from the elevator to the mill is an auxiliary movement to the transportation service from Henderson to destination in the south.

49. What tariff is it upon which you handle the grain business at Henderson from one industry to another at the rate of $4.00 per car?

177 A. That is the only tariff that we have, the one which you presented to me.

50. That is the tariff by which under section 9 it is provided that they would only move it as an accommodation, is that it?

A. Yes, section 9, page 130. I understand that I am answering, Mr. Clay, as to the movement of property by car from one industry to another as an accommodation.

51. Now have you any arrangement there for moving commodities from one industry to another except as an accommodation?

A. No, except this rule 8, which makes this provision, and I don't think it has any bearing upon this controversy. It provides in the second section that any subsequent switch movement to a location on the L. & N. tracks will be considered a local movement, and will be subject to charges and rules as provided for in rule 9 except that car rental charge will not be assessed where no part of the shipment has been unloaded, nor additional freight has been placed in the car. Now the explanation of that section is this: Suppose Mr. Clay had a carload of lumber from Nashville, Tennessee, consigned to himself at Henderson, and Mr. Clay has an industry located on a railroad track. When that carload of property was put on his track, alongside of his industry, he concluded that the lumber did not come up to the grade that he purchased. The railroad company had complied with the terms of its contract. It had taken the property from Nashville, Tennessee to Henderson, Kentucky, and had placed it at the premises of the consignee, Mr. Clay. Mr. Clay rejects the property, and says he will not receive it. The man who owns it sells it to another party, and says I want you to move it over to Mr. Jones' switch. He will receive this car. We move it from Mr. Clay's switch to Jones' switch, and he receives the property, and that is what that means, and we charge $2.00 for that second movement.

52. Getting back to my question, you have no tariff whatever by which you are authorized to charge $4.00 per car for switch-
178 ing from one industry to another in the city of Henderson except that section 9 of the Terminal Tariff in force at Henderson?

A. That is my understanding, Mr. Clay, yes sir.

53. Now whenever an elevator or a person engaged in the grain business wants to ship a carload of grain from one of its industries to another industry in Henderson, you have made it at Henderson, or your company has made it at Henderson a universal rule to accept that shipment, furnish the car, and collect for that $4.00 per car, have you not?

A. Whenever that service has been performed that would be the correct charge.

54. Now do you know of any request for service of that kind ever having been made by any of the grain elevators in Henderson, and refused?

A. I don't know that I do. I would say to you frankly that if Mr. Bullitt or Mr. Waller came to me and said "I desire to move grain from my elevator into Highleyman's mill there to be converted into hominy, or some other mill product," that I would cheerfully move it for him just the same as I would to Nashville, Ten-

nessee, direct for milling in transit at Nashville. And whether the milling in transit occurred at Highleyman's mill at Henderson, or whether it occurred at some other mill at Nashville, it would be milling in transit, and the movement from Waller's elevator to Higleyman's mill would be an auxiliary to the through movement.

55. If a person wants to move a carload of grain in Henderson from one mill to another, does he have to come to you to get your permission to move that grain?

A. No. Do you mean to C. B. Compton, at Louisville?

56. Yes.

57. Oh no, he goes to our representative to have this work done, and if this representative can make the charge that this tariff provides, and he can't do anything else, and if he don't under-
179 stand it, he must ask Capt. Howell, his immediate superior for his interpretation, and if Capt. Howell don't understand it, or it is possible he should not understand it, he must come to us for interpretation.

57. Give me the rule or the tariff or the regulation, or the statement in any schedule of rates which provides that the railroad company will charge grain dealers $4.00 per car for shipment between those parties, but will not charge coal dealers?

A. I don't pretend to make any such statement. I say we handle business for everybody in Henderson under the identical conditions, and we don't make any exceptions with regard to one set of property, or give it favor over another kind or set of property. The railroad company moves grain from the elevator to the mill as an auxiliary to the transportation service incident to milling in transit. It doesn't engage in moving flour or hominy from Highleyman's mill to the wholesale grocer in Henderson, nor does it engage in moving corn either from Waller's or Bullitt's elevator to a feed store or livery stable in Henderson; nor does it engage in the movement of coal from the Keystone mines to an industry or a team track or any other place in Henderson; nor does it engaged in the movement of any property at $4.00 per car made up of $2.00 for the service and $2.00 for car rental on any property other than that which is incident to milling in transit or as an accommodation to some one who is in trouble.

58. Now I will ask you to give me the provision of that tariff which says that you handle grain only as an auxiliary to milling in transit?

A. I don't think the tariff makes that specific statement, but all who are engaged in the transportation business know of milling in transit, in fact your city can't get along without it, and we have engaged in it there so long, and under these rules and regulations, that we don't think that it — necessary to undertake to express it in any other different terms than that which is now expressed.

59. That is an accommodation to the shipper and on no
180 other basis?

A. I didn't say that, I have not said it, and I don't intend to say it. I say that the arrangement from the river to the elevator and from the elevator to the mill is an auxiliary to the transportation service. The L. & N. Railroad might reasonably say: You can ship

it out from the elevator, or to the mill, you can go and get it at some other place, but that isn't doing Henderson justice. Henderson should have the same arrangement for milling in transit, whether from the river or from Evansville, or Chicago or St. Louis or from the river or from the elevator in Henderson to destination in the south, that the man at Nashville, Tennessee has got, and the man at Evansville has got, and the man at Birmingham, Montgomery, Atlanta, Chattanooga or any other point that competes with it, and that is all that we have done. We have put him on a parity with the other shipper from the north, with the reshipper from Evansville of the grain to the miller at Nashville who converts it there into mill products, and he has been put on the identical through basis by this means with the other shipper, with the Nashville shipper and others with whom he competes, and this is a thing that he needs, and it is a movement incident to transportation.

60. I am not at this time finding fault with your tariff or the arrangement by which you- tariff is arranged with regard to the grain business. What I am trying to get at is whether or not you furnish these facilities to the grain people under that provision which says you will do it only as an accommodation or not?

A. Yes sir, we do this thing for the Henderson reshipper, because we think it is right that he should have it, and we do not believe that because he has got that which he is entitled to under a reshipping arrangement furnished him, a movement from the elevator as an auxiliary to the through transportation that that is any reason why a man at a coal mine has got any claim on the L. & N. Railroad to do this transportation, in competition with carts. This
181 meritorious arrangement set forth in here for the mills at Henderson should not be used as a means of trying to force down a rate on coal or force in a rate on coal, and that seems to be your intention, to criticise milling in transit and reshipping at Henderson. I don't think there is a miller or grain dealer in Henderson who has ever found any fault with the arrangement for milling in transit or reshipping, and I don't believe that they will be willing that you should criticise this as not having merit.

61. When the time for argument of this case comes, Mr. Compton, I shall present then the proper argument to the Court. I do not wish now to indulge in an argument with you, and I will therefore ask you in replying to my questions to answer the question without going into an argument of the proposition involved in my question. You are a witness upon the stand and not counsel for the railroad company in the presentation of this case, and we will not only get along faster, but it will make your testimony competent if you will reply to the questions and not indulge in an argument. Now my question is do you——

A. Will you excuse me just a minute——

62. No, I desire, I am putting the question to you now——

A. I will ask you to excuse me for a minute——

63. (To the stenographer:) I want you to put down all of this, every word.

A. Yours or mine?

64. Both. My question to you is, do you provide this arrange-

ment to the elevators or as an accommodation to the Louisville & Nashville Railroad Company. Now answer that question.

A. After you have finished your lecture to me as to what I should do on the witness stand, and what I should not do, I will try to answer your question, but I do not propose that you shall tell me how I shall answer your questions when you put them in the way that you do.

182 65. I only want you to answer the question in the proper way.

A. I understand as well as you what the oath is, and I have confined myself to this, and I propose to continue to do it.

66. Will you answer the question?

A. The movement at $2.00 per car for the use of the car and $2.00 for the auxiliary movement is an accommodation to the miller and to the grain dealer at Henderson.

67. You are the same Mr. Compton who gave your deposition in this case on the 15th day of January, are you not?

A. Yes sir, this is my signature, Mr. Clay.

68. Do you know whether or not when a carload of grain is loaded at one of the elevators in Henderson for transportation and delivery to one of the other industries in Henderson any inquiry whatever is made or has ever been made by your agent at Henderson as to where that grain was ultimately going or what disposition was to be made of it ultimately?

A. Mr. Clay, the agent at Henderson has authority to move property as the tariff provides. If that tariff has been misapplied, I don't know. I can't believe that the agent would misapply it intentionally. I must say that I never saw a car moved from the elevator to the mill nor from the wharf boat to the mill, but I do know that the movement occurs, and I made the specifications in this tariff to provide for it, and our agents are expected to carry out those instructions.

69. Which instructions?

A. The instructions contained in the tariff.

70. But that tariff only provides that it shall be done as an accommodation. Now under that tariff, and taking that tariff alone as a guide without any instructions from the Traffic Department, what is to prevent the Louisville & Nashville or the agent of the Louisville & Nashville Railroad Co. from moving a carload

183 of coal from the Keystone Mining Company to any industry in Henderson, just taking the tariff itself as the guide?

A. Well, so far as the movement of the grain is concerned of course a shipper could misrepresent the transaction. That is not an impossibility. The railroads publish their tariffs and their rules and regulations as the law provides, but I don't know of any law that will prevent somebody or a man violating the law. So far as the movement of grain is concerned I have endeavored to explain to you why such is done. I have endeavored to show that we do not engage in transportation points in the city of Henderson. Now let me finish.

71. Go ahead, just make all the argument you want to.

A. I have endeavored to show that we do not move property ex-

cept under these exceptional circumstances as an accommodation. Now as to the movement of coal to which you refer specifically, the Railroad did not believe that it would be proper to move coal between two points within the city of Henderson, because it was in the city, it had its own teams, its own facilities, if it did not have them it could have employed them to deliver coal by its own devices in the city of Henderson without asking the railroad for the use of the car, and we concluded that it would be entirely reasonably not to handle that character of business as an accommodation or otherwise.

72. I still go back to my question. I repeat, taking the Tariff, and especially section 9 of that tariff, and taking the words according to their terms, without any outside reasons controlling, is there anything in section 9 of that tariff which provides that switching will be done, or transportation if you prefer the term, will be done from one industry to another in the grain business, and not in the coal business?

A. No sir.

73. Then the only way the agent at Henderson can accept shipments from one industry to another in the city for the grain business and refuse it for the coal business is the special instruc-
184 tions which that agent gets from his superior officer of the company?

A. Yes sir.

74. So that so far as the public is concerned in your published tariff you are just as much obligated according to section 9 of the tariff to accept those shipments in the coal business as you are in the grain business?

A. No sir.

75. According to the wording of the tariff?

A. No sir.

76. Isn't it just as much an accommodation to the coal merchant and coal dealer for him to have his coal shipped from one point to another, as it is to the grain dealer to have his grain shipped from one point to another?

A. No sir.

77. It is not?

A. No sir.

78. Do you know what the switching arrangement in Evansville is?

A. I think so. It is set forth in this tariff.

79. Do you know whether or not the Louisville & Nashville Railroad Company ships or switches coal from the Ingle Coal Company to any of the industrial plants in the city of Henderson?

A. I do not, sir.

80. Do you know that they do not do it?

A. No sir.

81. Examine your tariff with reference to Evansville and state whether or not such a switching charge is authorized under that tariff?

A. It does not authorize it.

82. Do you find the same provisions there that you do in section 9 of the tariff at Henderson?

A. I do.

185 83. Do you know whether any of the coal is switched from any of the coal mines in Evansville to the plants there?

A. I do not, but I don't believe so.

84. How about the work at Mt. Vernon, Indiana. Is there any switching there from industry to industry?

A. Not to my knowledge.

85. Now is there anything in the tariff at page 133 with reference to Hopkinsville showing that stone screenings shipped from the Dalton Stone Company is for use by the municipal corporation and no one else?

A. No sir.

86. On the other hand, does not that tariff expressly provide that the stone screenings shall be shipped to all industries on the tracks of the Louisville & Nashville Railroad Company in the Hopkinsville, Ky. switching limits?

A. The deliveries provided for in the tariff are specified thus: "All industries on the tracks of the Louisville & Nashville Railroad in Hopkinsville, Kentucky switching limits." That description means the town itself. Industries such as mills, elevators, and tobacco factories do not use stone. They do permit the city authorities when they get stone to use their industrial tracks. I have never seen any of the industries refuse as an accommodation to the city, in permitting the use of their track to unload stone. It is customary generally for industries to do that.

87. Mr. Compton, can you say that no industry in the city of Hopkinsville, Ky. has ever been shipped stone and screenings by the Dalton Stone Company for its own use?

A. No sir, no sir.

88. If any industry in Hopkinsville wanted stone and screenings for its own use under that tariff the railroad company would transport and deliver it from the Dalton Stone Company's plant, would they not?

186 A. I think so, but want to explain this, that the tariff was put into effect for the municipality. That was its object.

89. Mr. Compton what is to prevent the railroad from putting in tariffs for the benefit of cities and the inhabitants thereof? Why not if it would benefit the city of Henderson and the inhabitants thereof, why not put in a tariff at Henderson that would enable the people of Henderson to get the benefit of the mining of the coal within its own limits, and the benefits of the switching privileges at Henderson?

A. I don't think if we would haul coal from the coal mines it would have any effect whatever on the price of coal to the consumer.

90. Turning to the tariff at page 353, Canton, Georgia, does not that tariff provide for a rate on all classes of freight between all in-

dustries in the switching limits, of $2.00 per car for switching and $3.00 per car rental?

A. It does, but I say to you most emphatically that the only property that it is possible to move under that tariff is marble. That is all there is to it. It is really milling in transit. It is milling in transit of marble at Canton, Ga.

91. If anybody at Canton, Georgia, or if a plant or any other industry at Canton, Georgia, wanted to ship a carload of furniture from one industry to another at Canton, Georgia, couldn't it be shipped under that provision of the tariff?

A. No sir, there is no industry at Canton, Georgia, other than the marble industry. I don't think the town is big enough to use a carload of furniture.

92. What is the population of the town?

A. I don't know what it is. It is small.

93. Suppose the Marble Company at Canton wanted to ship a carload of machinery instead of a carload of marble from its plant to another industry in Canton, wouldn't it be shipped under that tariff?

187 A. I suppose if one of the marble industries there desired to erect a new shop and take the machinery out of its then existing shop and put it in the new, I think it would be competent to do that, it would be an accommodation.

94. Suppose they wanted to haul a carload of scrap iron out of their shop into another industry there, wouldn't it be hauled?

A. No sir, that is an impossibility. There is no other industry there, Mr. Clary, and in order to cover the matter completely and thoroughly that description was used. It cannot be applied as you have stated, because there is no business of that character to move. That tariff could be changed so as to say on car-loads to and from the marble industries. That is all it is necessary to say with regard to the application of that tariff, and it covers that which I have stated, and nothing else.

95. Do you really mean to say that there is absolutely no manufacturing plant of any kind at Canton, Georgia except the marble industries?

A. I certainly do.

96. And there is no industry of any kind, no hardware store or merchandise store, or anything of that kind?

A. Oh, they have small stores in the village, yes, but they are not served by railroad tracks.

97. How many marble works are there on the line within the switching limits of Georgia?

A. I think there are three or four.

98. If one party had a carload of marble that he wanted to transport and deliver to another concern there, under this tariff the railroad company would do it for this charge of $5. per car total, would it?

A. It wouldn't be a movement, understand, under that tariff, it would be an auxiliary movement to the transportation service at that price.

188 99. How do you know that Mr. Compton?

A. Well, I know that there is quarried at Canton, Georgia hundreds, you might say thousands of carloads of marble per annum. We know that the city or town of Canton is a very small village, and we know that the business must move from there to be consumed. The town of Canton Georgia cannot consume the output of the marble quarries at its own point. It is impossible. We know by the nature of the thing, Mr. Clay that the business must move to the market. It is quarried for the Market.

100. Do you know whether in any of those plants livestock is kept or not, for use in the business?

A. I think not, I don't think they use any stock at all.

101. What kind of plants do they have?

A. They have plants that are constructed of wood mostly. They are crude sheds into which the cars are run. The marble is unloaded from the car on to what they call the sawing block, and there placed under the saws to be sawed in shape.

102. Is there enough lumber at any one of those plants to make a car-load if the buildings were torn down or any part of them were torn down?

A. I am not sure I don't know.

103. Suppose that one of those plants should tear down half of its building, and should notify the Railroad Company to place a car and should load that lumber into that car, and should direct the railroad company to haul it up to one of the other plants, and there deliver it. Wouldn't the railroad company do it under this tariff?

A. As an accommodation it would, yes.

104. Would it do it as an accommodation or under this tariff providing for the switching at Canton?

A. It would do it as an accommodation.

105. Doesn't the tariff provide that it will do it between all industries at that rate, regardless of the commodity?

189 A. The construction that you place on it is highly improper. It would only be done as an accommodation.

106. That would be a class of freight, wouldn't it, and come within the term "all classes of freight."

A. Not under that tariff.

107. Is there anything in the tariff at Canton about an accommodation?

A. It is our custom generally over the entire system to not undertake the movement of property between any two points within the limits of a city in competition with drays or the driving of livestock, and we do it only as an accommodation. These tariffs provide for an auxiliary movement to the transportation service, and that is the intent and purport of the tariff.

108. I will get you to examine the terminal tariff showing the switching charges at Canton, Georgia, and show me where it is provided in that tariff that it will be done only as an accommodation?

A. I will ask you to look at the tariff and show me where it is not provided for?

109. You are the witness on the witness stand, and I am examining you, and you are answering my questions, and I am not answering yours. My question to you is to show me where it is provided in that tariff that it would only be done as an accommodation?

A. I will refer you to that tariff from page 1 to page 354. You will find throughout the provision that the Louisville & Nashville Railroad Company does not engage in local switching between switches, tracks, or warehouses, but where any such service is performed as an accommodation the tariff shall be assessed.

110. Wasn't the provision that you just read with reference to the tariff at Evansville, and not with reference to the tariff at Canton, Georgia?

A. I stated that throughout the tariff that provision was
190 provided for in the tariff. That provision applies also at Canton.

111. Is there anything in the tariff showing that it applies at Canton?

A. Throughout the tariff it is so provided.

112. Now with reference to that provision where it is provided that it does not engage in the business of local switching between switches, can you find a single place in that whole tariff where that provision is in it without naming the city with reference to which that provision applies?

A. I will say to you that that is the rule generally of the Louisville & Nashville Railroad Company, and that is the rule we observe, and the one we require our people to observe. We do not engage in the movement of property between points within the limits of cities or towns. I state that most emphatically.

113. Now is there a provision in the terminal tariff where that statement is made except where in the provision itself the City is named where that exception comes?

A. It is named, as I stated before, throughout the tariff. I say to you——

114. Turn to the tariff?

A. I say to you most emphatically that we do not engage in the transportation of property between points within the limits of cities. Now we do not do it at Canton, Georgia, or Evansville, or Hopkinsville, or any other town.

115. Can you tell me then what it means by saying at Canton, Georgia on all classes of freight between all industries in switching limits?

A. Yes, as I explained before Mr. Clay, it was simply a simple way of expressing it, that is all.

116. Mr. Compton, let me get the milling in transit arrangement: Does that mean that if the Henderson Elevator Company has say
100,000 bushels of corn at points in Indiana, that they can
191 ship that grain to Henderson, rehandle it, and ship it out to some other point, say Nashville, paying the local freight on it from the Indiana points to Henderson, and then getting the bene-

fit of that rate in the through rate to the other points. Is that a milling in transit arrangement?

A. Yes sir. May I explain it to you?

117. Yes. If that doesn't explain it fully, just give me the explanation of the milling in transit arrangement?

A. I think you did not draw out the fact fully. Under the agreement from the point north of Evansville you said these cars would move to Henderson. It would move from Henderson to the destination in the south under the reshipping and milling in transit arrangement at the same rate to destination from the original point, that a shipper at the original point would be charged.

By Mr. MOORMAN:

118. Is it necessary to give the milling companies at Henderson a milling in transit arrangement to enable those companies to compete with milling companies at other points?

A. Yes sir.

119. Is it necessary to give the Crescent Coal Company or the Keystone Mining & Manufacturing Company a rate of $2.00 per car or any special rate to enable that company to compete with other coal companies in that territory?

A. No sir.

Reading and signature waived.

STATE OF KENTUCKY,
County of Jefferson:

I, Elizabeth Harrison a Notary Public within and for the state and county aforesaid, certify that the foregoing depositions of R. W. Powell and C. B. Compton were taken before me at the time and place and for the purpose in the caption stated; that said
192 witnesses were first duly sworn to tell the truth, the whole truth and nothing but the truth, that said depositions were taken by me in shorthand, and the foregoing is a true and complete transcript of my notes; that the plaintiff was represented at the taking of said depositions by Mr. J. W. Clay, and the defendant by Mr. C. H. Moorman and Mr. Malcolm Yeaman. Reading of said depositions and signatures were waived by counsel.

Witness my hand this 23rd day of April, 1910. My commission expires January 10th, 1914.

ELIZABETH HARRISON,
Notary Public, Jefferson Co., Ky.

The Exhibit #1 referred to in the foregoing deposition is here copied, viz:

Louisville & Nashville Railroad Company.

No. 63275.

Henderson Elevator Co. to L. & N. R. R. Co., Dr.

For Switching Car.

Initials.	Number.	Contents.	Weight.	Rate.
L. & N.	380	Coal	——	Switching Charge, $2.00

From	To	For
Keystone.	H. E. Co.	

R. W. Powell, Agent L. & N. R. R. Co.

Henderson Station 3/4 1908.
All bills payable in bankable funds.
Checks if accepted should be drawn in favor of the Louisville & Nashville Railroad Co.
Received Payment,

R. W. POWELL, *Agent.*

Exhibit *No.* R. W. P. #1.

The Exhibit No. 2 referred to in the foregoing deposition is here copied, viz:

Louisville & Nashville Railroad Company.

No. 63598.

Crescent Coal Company to L. & N. R. R. Co. Dr.

For Switching Car.

193

Initial.	Number.	Contents.	Weight.	Rate.
L. & N.	321	Coal	——	Rental & Switching charge, $4.00

From	To	For
Keystone Mines.	H. E. L. P.	

R. W. Powell, Agent L. & N. R. R. Co

Henderson Station 4/15 1908.
All bills payable in bankable funds.
Checks if accepted should be drawn in favor of the Louisville & Nashville Railroad Co.
Received Payment,

R. W. POWELL, *Agent.*

Exhibit *No.* R. W. P. #2.

The Exhibit #3 referred to in the foregoing deposition is here copied, viz:

Keystone Mining & Manufacturing Company, Incorporated, Miners and Shippers of Bituminous Coal. Mines Located on L. & N. and I. C. Railroads.

HENDERSON, KY., *July* 1, 1908.

Mr. R. W. Powell, Ag't, Henderson, Ky.

DEAR SIR: Kindly place me two L. & N., 80,000 capacity cars, to be loaded with coal. Shipment to be made to A. Waller & Co., and Henderson Elevator Co.

Yours very truly,

KEYSTONE MINING & M'F'G CO.,
By L. A. BOSSERMAN, *Treas.*

Exhibit *No.* R. W. P. #3.

The Exhibit #4 referred to in the foregoing deposition is here copied, viz:

JULY 13TH, 1908.

194 Mr. R. W. Powell, Local Agent L. & N. R. R. Co., Henderson, Ky.

DEAR SIR: The Crescent Coal Co. through Mr. Jo. Higdon has consulted us with reference to your refusal to place cars as ordered at the plant of the Keystone Mining & Manufacturing Co. to be loaded with coal for delivery to various industrial plants in the City of Henderson, Ky. We understand from Mr. Higdon that you have not only refused to furnish such cars under your published tariff, but that you have refused to furnish them at all, or to quote him a rate at which you were authorized to furnish and transport the same.

We wish to advise you that the Crescent Coal Co. has made a year's contract with the Keystone Mining & Manufacturing Co., and also placed large orders for coal with the industrial enterprises in Henderson Co., and his ability to fill his contracts at both ends is absolutely dependent upon your company furnishing the empty cars, and transporting them as ordered. Heavy loss has already been sustained by the Crescent Coal Co., and much greater loss will be sustained unless you shall comply with your public obligations. Your Company will be held responsible for the loss which has already accrued and which may hereafter accrue. In addition to this we are about to take legal steps to compel the Louisville & Nashville Railroad Co. to furnish the empty cars and transport this coal under its present tariff, or if the present tariff does not cover it, steps will be taken to compel your company to fix a reasonable tariff and to furnish the cars and transport them when loaded at the tariff so fixed.

It seems to us that your duties in this connection are so thoroughly settled that there ought to be no difficulty on the part of the officers of your company in reaching a conclusion as to its obligation, and settling this matter without further proceeding. In the
195 hope that this result may be accomplished we shall await a reply from you for ten days from this date. If we do not hear

from you within that time we shall assume that *on* adjustment of the matter can be arrived at without legal proceedings, and shall take steps, for an- on behalf of the Crescent Coal Co. accordingly.

Yours truly,

——— ———.

Exhibit *No.* R. W. P. #4.

The Exhibit No. 5 referred to in the foregoing deposition is here copied, viz:

Louisville & Nashville Railroad Company.

In your reply refer to 1113.

HENDERSON, KY., *July* 16, 1908.

Messrs. Clay & Clay, Attorneys-at-Law, City.

GENTLEMEN: I am in receipt of your favor of the 13th inst. with reference to furnishing the Keystone Mining & Manufacturing Co. with cars for movement of coal from that plant to the various industrial plants in the City of Henderson for account The Crescent Coal Company.

We cannot furnish this mines, or any other similar concern, with cars for switching coal to points within the yard limits at Henderson at the switching rate; but, we will furnish cars and perform this service at rate of 50 cents per ton. I have submitted the matter to our Traffic Department, and if any change is made we will advise you at once.

Yours truly,

R. W. POWELL, *Agent.*

R. W. P./x.

196 Exhibit *No.* R. W. P. #5.

Henderson Circuit Court.

JO HIGDON, Doing Business in the Name of Crescent Coal Company, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

Notice to Take Depositions.

The plaintiff will take notice that on Wednesday the 20th day of April, 1910, in the Library Room of the Office Building of the Louisville & Nashville Railroad Company on Broadway in Louisville, Kentucky, between the hours of 9 A. M. and 5 P. M. the defendant in the above styled action will take the depositions of C. B. Compton and R. W. Powell to be read as evidence for the defendant on the trial of said action and will continue from day to day.

LOUISVILLE & NASHVILLE RAILROAD CO.,

By YEAMAN & YEAMAN, *Attorneys.*

April 12th, 1910.

The foregoing Notice bears on its reverse the following official endorsement, Viz:

Executed on the within named Jo Higdon doing business in the name of Crescent Coal Co. by delivering him a true copy hereof. This Apr. 13, 1910.

A. H. ABBOTT, *S. H. C.*
G. M. ROYSTER, *D. S.*

197 Henderson Circuit Court.

Jo HIGDON, Doing Business as Crescent Coal Company, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD Co., Defendant.

Notice to Take Depositions.

The plaintiff in the above entitled case will take notice that on Thursday the 5th day of May 1910 the defendant in said case will, at the office of Yeaman & Yeaman in the Ohio Valley Banking & Trust Company Building in the City of Henderson Ky. proceed to take the depositions of witnesses to be read as evidence in its behalf on the trial of said case and will continue from day to day.

YEAMAN & YEAMAN,
Attorneys for L. & N. R. R. Co.

May 2nd, 1910.

The foregoing notice bears on its reverse the following official endorsement, Viz:

Executed on the within named Joe Higdon by delivering to him a true copy hereof, this 3rd day of May 1910.

A. H. ABBOTT, *S. H. C.*
B. C. CROWDER, *D. S.*

The following depositions referred to in the foregoing Bill of Exceptions are here copied, Viz:

Deposition of J. L. Nicholson, taken at the law office of Yeaman & Yeaman, in the Ohio Valley Banking & Trust Company Building, in the City of Henderson, Ky., on May 5th, 1910, to be read as evidence in behalf of the defendant in a suit now pending in the Henderson Circuit Court wherein Jo. Higdon, doing business in the name of the Crescent Coal Company, is plaintiff and the Louisville & Nashville Railroad Company is defendant, pursuant to notice hereto attached.

Witness being first duly sworn testified as follows:

Examined by Mr. M. YEAMAN, for def't:

198 Q. Please state your full name, your place of residence, your occupation, and how long you have been engaged in

that occupation, and if you shall say you are in the coal business state in what way and how long you have been engaged in the coal business, and what has been your connection with the business?

A. James L. Nicholson, Henderson, Ky. I am running a coal mine, coal operator. I have been connected with mines all my life, for 36 years. I started as a trapper boy and done everything up to owning mines.

Q. Do you own the mine you are now operating?

A. Yes sir; that is the family owns it.

Q. How long has it been in operation, your present mine?

A. Pretty near two years.

Q. What mines have you been connected with as Manager and operator, other than the one you now own and operate?

A. You would have a list. Sanford & Dublin, Philipsburg, Pa. Hastings Coal & Coke Co., Hastings, Mitchell Coal & Coke Co. of Pennsylvania. Pennsylvania Coal & Coke Company. I was connected with the mine of Thos. A. Nevins, who was the originator of the West Kentucky Coal Company, and then the Keystone Mining & Manufacturing Co. in Henderson, Ky.

Q. What connection had you with the Keystone Mining & Manufacturing Company; when did your connection commence and when did it — and what was your relation to that Company?

A. I was Secretary & Treasurer and Manager. I commenced in the latter part of 1905 and terminated in June 1907. I bought all the land in connection with it, put down the shaft and put in the machinery and started the mine and equipped it.

Q. When did that Company commence mining coal for market?

A. I think it was in December 1906; yes sir; December 1906.

Q. Is that mine running now, if not, when did it cease to mine coal?

199 A. I think it ceased in May or June 1909.

Q. What was the depth of that mine?

A. 500 feet.

Q. How many veins of coal did it reach; that is how many workable veins?

A. Two; there was three veins that was over three feet and whenever a vein is three feet they generally mine it. There was really three veins.

Q. How many veins did that mine attempt to work?

A. Up to the time I left, one.

Q. After you left how many veins did they attempt to work, according to your understanding?

A. I never was down in the mine. My understanding was they worked two.

Q. What is your understanding as to the time they worked the lower vein?

A. I am not positive, but I think about six months after I quit.

Q. Did they then abandon the lower vein?

A. I understood so.

Q. How long did they continue to work the upper or any vein of the mine?

A. As I understood, as I said before, they quit operating in May or June. I want to state that on these dates I am just giving it from memory and I may be somewhat out.

Q. To what extent did that Company mine coal during the time that you were in charge, as to quantity taken out.

A. They were running anywhere from 125 to 175 tons a day.

Q. To what extent did it mine coal, according to your understanding, *have* you left, up to the time they shut down?

A. I only have this from their foreman. He was down at the mine and told me that they were running about 150 tons. Mr. Miller was the foreman.

200 Q. What experience have you had, and what knowledge have you of the delivery of coal in Henderson by wagons, either from mines or trains or coal depots. I mean as to the cost of delivery by wa*y*ons?

A. Yes sir. I have. I delivered from three places. The Henderson Mining & Man'f'g Co., the Keystone and my own mines.

Q. By wagon?

A. By wagon?

Q. To what character of consumers did you deliver, I mean domestic or manufacturing establishments?

A. Both domestic and steam.

Q. How many mines are within wagon delivery distance of the City of Henderson?

A. Three, well four counting the Henderson M. & M. Company.

Q. How many coal dealers are there in Henderson that deliver coal by wagons?

A. There is so many. Every coal dealer in Henderson delivers by wagon. I would judge there is seven or eight active ones.

Q. From your knowledge and experience and judgment of the matter of delivering coal by wagon to the consumers of Henderson both domestic and steam coal, especially steam coal, what does it cost?

A. Between 35 and 40 cents a ton.

Cross-examined by JAS. F. CLAY, for pl'ff:

Q. You left this mine some six months after it was first opened?

A. I think so.

Q. Who took charge of it then?

A. Wm. Shiffer.

Q. You were not down in the mine at any time after you left?

A. No sir.

Q. Have not been down up to this time?

A. No sir.

Q. Your testimony in regard to the operation of the veins is founded upon what somebody told you?

201 A. Yes sir.

Q. If those mines could have been operated after you left, what amount of coal, under proper management could have been obtained from both veins per day, how many tons?

A. It depends greatly on conditions. I don't know the conditions which were encountered after I left.

Q. If the veins could have been successfully operated how much coal do you think could have been taken out per day?

A. Mr. Clay not knowing the conditions it is hard to say what. Never having been down in the mine to see the conditions it would be hard to say.

Q. You don't know why they shut down the Keystone Mine?

A. No.

Q. In handling coal by the wagon per ton you say that it costs 35 or 40 cents per ton?

A. Yes sir.

Q. In that cost the driver of the wagon loads the coal does he?

A. He just pulls the chute, and it runs in.

Q. In delivering the coal does he handle the coal himself, the driver?

A. Yes sir.

Redirect ex. by Mr. M. YEAMAN for Def't:

Q. Up to the time that you quit the Keystone Mining & Manufacturing Co.'s mine were you down in the shaft and in and through the mine; if so how frequently?

A. Every day or so.

Q. Had they commenced to open the lower vein at the time you left there?

A. I opened it.

Q. How far had you gone into that vein when you left?

A. I couldn't say just exactly how far but we had gone far enough to have a capacity as I said of from 150 to 175 tons a day.

202 Q. What was the character of the roof of that lower vein so far as you went and had opportunity to observe?

A. It was bad.

Q. What was the character of the roof of the upper vein?

A. I never saw it, the roof of the upper vein, other than what I saw in sinking the shaft.

Q. They commenced their mine operation in the lower vein did they?

A. Yes sir.

Q. And had not commenced taking out coal from the upper vein when you left?

A. No sir.

Q. I understand you to say that the cost to the sellers of coal, delivering it to consumers in the City of Henderson would be about 35 to 40 cents per ton; I mean the cost of delivering by wagon?

A. Yes sir.

Recross ex. by JAS. F. CLAY for Pl'ff:

Q. The entrance to the mine, notwithstanding the roof, was made safe while you were there, and they could mine?

A. I was mining 125 to 175 tons a day.

Deposition of H. J. McAvoy taken at the same time and place to be used for the same purposes stated in the caption.

Examined by M. Yeaman for Def't.

Q. What connection, if any, have you with the Henderson Brewing Company?
A. I am Manager for that Company.
Q. And have been for how long?
A. For eight or ten years.

203 Q. Has the plant of the Henderson Brewing Company physical connection by switch or otherwise with the track of the Louisville & Nashville Railroad Company?

A. It has.
Q. State whether or not the plaintiff, Jo Higdon and the Henderson Brewing Company had any contract in the years 1908 or 1909 by which Higdon was to furnish the Brewing Company with steam coal or other coal to be used in its plant or otherwise?
A. We had no contract with Mr. Higdon in either of the years 1908 or 1909.

Cross-ex. by Mr. Jas F. Clay, for Pl'ff:

Q. Did you have any contract during any year with the Crescent Coal Company?
A. No sir; we have never had a contract with the Crescent Coal Company.
Q. Did the Crescent Coal Company deliver to you at any time during the years that you have been there, and if so what year or years, any coal?
A. I have never purchased any coal of the Crescent Coal Company.
Q. From whom did you buy your coal in the year 1908?
A. Mostly from Kobt. Powell, or all of it.
Q. Was that coal switched to you over Powell's switch?
A. It was delivered to us over our switch which connects with the L. & N. road. I don't know whether it was switched from Powell's yard or not.
Q. Powell has a switch track connected with the L. & N. railroad has he not?
A. Yes sir.
Q. You don't know whether it was switched from Powell's track to you or whether direct from the L. & N.?
A. Most likely it was switched directly from the L. & N.
Q. You don't know?
A. No sir.

204 Redirect ex. by M. Yeaman for Def't:

Q. Where was the coal that you used in 1908 and 1909 mined, from what mine did it come?
A. Mostly from mines in Hopkins County.
Q. Was any of it mined in the City of Henderson?

A. None of it received in cars was mined in the City — Henderson.
Q. Did you use any coal that was delivered by wagons?
A. Yes, I expect we used some.
Q. Where was that coal mined?
A. That was mined at the People's Mine and at Nicholson's mine.
Q. These mines are in the City of Henderson are they not?
A. Yes sir.

Cross-ex. by JAS. F. CLAY for Pl'ff:

Q. Did I understand you to say that these mines are in the City of Henderson?
A. I think they are within the City limits, I'm not positive. No, I don't believe I'm right about that; I think I am mistaken about their being in the City limits. Probably within a quarter of a mile.
Q. Do you know the switching limits of the L. & N.?
A. No sir; I do not.

Also the deposition of HENRY KRAVER taken at the same time and place and to be used for the same purpose.

Examined by M. YEAMAN for Def't:

Q. Where do you reside Mr. Kraver and what is your business?
A. I reside in Henderson, Ky. My business is distillery business.
Q. Where is your distillery situated, and where was it situated in 1908 and 1909?
A. In 1908 I think it was out of the City limits but since 1909 they took us in.
205 Q. Had your distillery in 1908 and 1909 physical connection by switch or otherwise with the Louisville & Nashville Railroad track?
A. Yes sir.
Q. Had you any contract or agreement with Jo Higdon or the Crescent Coal Company during either of those years by which Jo Higdon was to furnish your distillery with steam coal or other coal?
A. No sir; I didn't have any contract but I occasionally bought there in 1908, I bought one or two car loads of coal from him.
Q. Just ordered that of him as you needed it?
A. Yes sir.
—. But you had no contract or agreement with him?
A. No.
Q. What coal did you use mostly in those years?
A. Mr. Powell supplied me with a good deal, also Marshall & Alves, but since 1909 the People's Mine has been supplying me in wagons. We are taking from them now.

Q. How does the People's Mines deliver its coal to you?
A. In wagons. *That* have a wagon that makes about five loads every day.
Q. How much a bushel, in your judgment if you have any opinion about it, does it reasonably cost to deliver that coal in wagons, I mean just the cost of delivery?
A. I am not certain but I believe they charge you 70 cents a load and that is about two ton to a load, they make five loads. I understand they charge 35 cents a ton and two tons to a load would be 70 cents. About $3.50 a day for a team and a man.
Q. Where was the coal you bought of Powell mined?
A. Earlington, St. Bernard.
Q. Came to Henderson from Hopkins County on the railroad did it not?
A. Yes sir.

Cross-ex. by JAS. F. CLAY for Pl'ff:

206 Q. The coal delivered by Mr. Powell was purchased from Powell?
A. Yes sir.
Q. It was delivered over your switch by Powell under his contract with you?
A. Yes sir.
Q. And came over the tracks of the L. & N. Railroad?
A. Yes sir.
Q. Did the same thing occur in regard to the coal you bought from Marshall & Alves?
A. I think they got their coal from Madisonville, also in Hopkins County.
Q. The coal was delivered to you by Marshall & Alves over the tracks of the L. & N.? Came directly from there and into your switch?
A. Yes sir.
Q. Marshall & Alves controlled the delivery of the coal?
A. Yes sir.
Q. In handling coal by wagons the driver handles the coal?
A. Yes sir; he puts it into the wagons and unloads it.
Q. How do they do in handling it by cars?
A. We have to unload it ourselves.

Also the deposition of PAUL J. MARRS taken at the same time and place to be used for the same purpose.

Examined by M. YEAMAN for Def't:

Q. What connection, if any, have you with the Henderson Cotton Mills and how long has that connection existed?
A. I am Secretary & Treasurer and have been so since it- original existence, about 25 years.
Q. Who is the active managing officer of the Cotton Mill?
A. I do the purchasing and the general management of it and the President is at the head of the corporation.

Q. Has the plant of the Henderson Cotton Mill any physical connection by switch or otherwise with the track of the Louis-
207 ville & Nashville Railroad, or any other railroad Company?

A. No we have none except our switch is connected with both roads.

Q. The switch from your Cotton Mill plant connects with what roads?

A. The L. & N. and I. C. Railroads.

Q. Had the Henderson Cotton Mill any contract or agreement with the plaintiff Jo Higdon or the Crescent Coal Company by which Jo Higdon or the Crescent Coal Company was to furnish steam coal or other coal to the Cotton Mill in either the years 1908 or 1909?

A. No sir; none.

Q. Did you ever use any of the coal of the Keystone Mining & Manufacturing Company at the Cotton Mill, if so, when and to what extent?

A. Never have used any of it, sir.

Q. Have you any knowledge of that coal as steam coal?

A. None whatever sir, except in a general way, comparing it with other coals here.

Q. How does it compare as steam coal with other coal?

A. So far as my knowledge goes it is about like our Henderson coal here.

Cross-examined by JAS. F. CLAY for Pl'ff:

Q. You have no knowledge by actual experiment of the quality of the coal as steam coal?

A. No sir.

Redirect ex. by Mr. M. YEAMAN for Def't:

Q. Is the Keystone Mining & Manufacturing Company in operation now?

A. I think not.

Q. How long has it been closed down and out of operation?

A. I think over a year.

Q. Is not the mine full of water?

A. I don't know.

208 Mr. JAS. F. CLAY for Pl'ff:

Q. Do you know why it closed?

A. I do not, sir.

Also the deposition of WILLIAM ELLIOTT taken at the same time and place and to be used for the same purpose.

Examined by Mr. M. YEAMAN for Def't:

Q. Where do you reside and what is your business?

A. City of Henderson and my business is tobacco partly.

Q. Do you own a tobacco house or stemmery that has physical connection with the L. & N. Railroad by switch or otherwise?

A. Yes sir; I have a switch into the factory controlled by the L. & N.

Q. You mean the switch is under the control of the L. & N.?

A. Yes sir.

Q. Was that the case in the years 1908 and 1909?

A. Yes sir.

Q. Had you in either of those years any contract or agreement with Jo Higdon or the Crescent Coal Company to furnish you steam coal or other coal for the use of the plant?

A. No sir.

Also the deposition of L. A. KUESTER taken at the same time and place and to be used for the same purpose.

Examined by Mr. M. YEAMAN for Def't:

Q. What is your business and place of residence at present?

A. I am bookkeeper and Manager of the Henderson Desk Company now.

Q. What was your business and place of residence in the years 1908 and 1909?

209 A. 1909 I was with the Henderson Desk Company same as now, book-eeper and general manager, and in 1908 I was not doing anything up until November until the Henderson Desk Company went into business.

Q. Did you have any connection with the Ohio Valley Furniture Company?

A. Yes sir.

Q. At what time, what year?

A. In 1907 was when they started in business I think.

Q. How long did you continue with them?

A. I continued with them as long as they were in business. We quit the first of May, then it was sold on the 28th day of September 1908.

Q. Who purchased the Ohio Valley Furniture Company plant?

A. J. W. Todd.

Q. Did the Ohio Valley Furniture Company have any physical connection with the L. & N. by switch or otherwise?

A. There is a spur or switch that runs from the Belt line up to the factory.

Q. Did and does the Desk Company with which you are now connected have such connection with the railroad?

A. Yes sir.

Q. Did the Ohio Valley Furniture Company or the Henderson Desk Company *which* which you are now connected during the years 1908 or 1909, or at any time, have any contract or agreement with Jo Higdon or the Crescent Coal Company by which Jo Higdon was to furnish steam coal or other coal to the Ohio Valley Furniture Company or the Desk Company?

A. No sir.

Q. How did the Furniture Company and the Desk Company get their coal in 1908 and 1909?

A. By wagons from the Peoples coal mine.

210 Also the deposition of SAM J. ALVES taken at the same time and place to be used for the same purpose.

Examined by M. YEAMAN for Def't:

1 Q. In what business are you engaged and how long have you been so engaged?

A. Coal and other business and about 15 years since I came back to Henderson.

2 Q. Do you buy coal and sell and deliver it in Henderson?

A. Yes sir.

3 Q. Where does your coal come from?

A. Madisonville.

4 Q. Comes in on the railroad from Madisonville?

A. Yes sir.

5 Q. How is it delivered to the consumer after it gets to Henderson?

A. It is put in wagons and delivered.

6 Q. How much does it reasonably cost to deliver coal from a point in Henderson to the average consumer in the City?

A. From 1 to 1 and ½ cents a bushel.

7 Q. What does a bushel of coal weigh?

A. 76 pounds; by the ton 80 lbs. to the bushel; 76 to the consumer.

8 Q. Then there are about 25 bushels to the ton?

A. Yes sir; we deliver a ton and a fifth, 30 bushels is a load.

9 Q. Putting the cost of delivery at from a cent to a cent and a half a bushel, it would be from 30 to 37 cents a ton would it not?

A. Yes sir.

The Certificate to the foregoing depositions of J. L. Nicholson, H. J. McAvoy, Henry Kraver, Paul J. Marrs, Wm. Elliott, L. A. Kuester and Sam J. Alves is copied on page 89.)

Deposition of Henry Liveright, Taken at the Law Office of Yeaman & Yeaman, in the City of Henderson, Ky., on the 15th Day of October, 1910, by Agreement, to be Used as Evidence for

211 *the Defendant in a Suit Now Pending in the Henderson Circuit Court Wherein the Crescent Coal Company is Plaintiff and the Louisville & Nashville Railroad Company is Defendant.*

Question- by Attorneys for Defendant, Mr. M. YEAMAN:

Q. If you hold any position with the Keystone Mining & Manufacturing Company, state what that position is and how long you have held it.

A. I am at present Secretary and Treasurer of the Keystone Mining & Manufacturing Company and have been the Secretary of the same since practically its formation, with the exception of about one year when I was sick, during which time Mr. Shiffer was Secretary. That was from July 1907 to July 1908 about that — Mr. Shiffer was Secretary.

Q. As Secretary of the Keystone Mining & Manufacturing Company have you knowledge of the extent and character of its business, of the quantity of coal mined and of the actual capacity of the mine?

A. I have so far as the books show and partly from my own knowledge.

Q. How long have you been acquainted with the Keystone Mining & Manufacturing Company plant in the City of Henderson?

A. Almost from its formation.

Q. To what extent, if at all, are you personally interested in it?

A. I own bonds and stock of the same.

Q. About what amount in all has been invested in that plant?

A. About $230,000.

Q. Is the Keystone Mining & Manufacturing Company running now, taking out coal?

A. No.

Q. When did it cease operations?

A. About the middle of May 1909.

Q. At the time it ceased mining coal and for the period of its existence up to that time, what was the actual mining ca-
212 pacity of the plant?

A. From 150 to 200 tons a day.

Q. What amount did it actually take out?

A. Well we took out about 30,000 tons of coal from June 1907 until the middle of May 1909, but previous to that we took out some coal which was mined by day laborers in opening the mine of which we have no record of the tonnage exactly.

Q. Then if I understand you, your actual capacity was from 150 to 200 tons a day; that is, you could have taken out that quantity had there been occasion for it?

A. Yes sir.

Q. And not counting that that was taken out previous to the time you kept a record, there was taken out in all some 30,000 tons?

A. Yes sir; about 30,000 tons.

Q. How deep is the shaft of that mine and through how many veins does it run?

A. The No. 9 is about 160 feet below the surface and the other is about 450 or 460, the No. 11.

Q. When did the plant cease mining the lower vein, the No. 11?

A. In the winter of 1908-1909. We abandoned it about January or February 1909.

Q. Why was the lower vein abandoned?

A. There were several reasons, and in the first place it was more expensive to mine and then we had bad roof.

Q. As I understand you, the mine closed down entirely in May 1909?

A. Yes sir; the middle of May 1909. We worked on the first half of May and after that we quit working.

Q. Why did the mine close in May 1909?

A. We had not sufficient orders to make it pay.

Q. When did Mr. L. A. Bosserman leave the plant?

A. At the beginning of February 1909.

A. No sir; I never had any conversation with Mr. Powell about such a car.

Q. Did you have any conversation with Mr. Powell about this particular car load of coal, prior to the time it was placed at the Electric Light Plant and unloaded?

216 A. I don't remember. I may have had a conversation with him about placing the car in there in the event I should make the purchase, but I don't remember just at the moment.

Q. Your directions, your recollection is, were given to Mr. Brasher?

A. Yes sir.

Mr. M. Yeaman, att'y for def't, being present declined to cross-examine.

STATE OF KENTUCKY,
County of Henderson:

I, A. Fitz Gibbon, a Notary Public, in and for the County and State aforesaid do certify that the foregoing deposition of Jo Higdon taken in rebuttal, by agreement was given before me at Henderson, Ky., that said witness was first duly sworn that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth; that it was written by me in shorthand and afterwards transcribed and the signature thereto waived by the parties I further certify that at the taking of said deposition the plaintiff was present by Jo Higdon, testifying, and Jas. W. Clay, counsel for plaintiff and defendant was present by Mr. Malcolm Yeaman, attorney for defendant.

Given under my hand this October 20th, 1910. My commission expires Jan'y 10, 1914.

A. FITZ GIBBON,
Notary Public, Hend. Co., Ky.

On October 21, 1910 the following deposition of C. M. Bullitt was filed herein, to be read as evidence of plaintiff, Viz:

Deposition of C. M. Bullitt, Taken in Rebuttal, at the Law Office of Clay & Clay, in the City of Henderson, Ky., by Agreement,
217 *to be Read as Evidence on Behalf of the Plaintiff in an Action Now Pending in the Henderson Circuit Court Wherein Crescent Coal Company is Plaintiff and the Louisville & Nashville Railroad Co. is Defendant, This October 21st, 1910.*

Examined by JAS. W. CLAY for Pl'ff:

Q. State your name, age, residence and occupation?

A. C. M. Bullitt; residence, Louisville, Ky., occupation, grain business, President of the Henderson Elevator Company.

Q. What is your business address?

A. Henderson Elevator, Henderson, Ky.

Q. As President of the Henderson Elevator Company, what proportion of your time do you spend in the City of Henderson?

A. About five days in the week I should say.

Q. Were you president of the Henderson Elevator Co. in March and April 1908?

A. Yes sir.

Q. I will get you to state whether or not in either March or April 1908 you purchased a car load of coal from the Keystone Mining Company, and if so, state the facts in connection with that purchase, how it was delivered to your plant.

A. In March 1908 Mr. Bosserman was the manager of the Keystone Mine and boarding at the same place that I was and we got to discussing business in general and coal in particular and he mentioned the price at which he was selling his steam coal, slack. It was so much cheaper than I had been paying for coal I told him I would like to buy their coal and he said he would be very glad to sell me all I could use if I could arrange to get it to the plant, but that he didn't believe that the railroad, the L. & N. would let him switch it. I told him he certainly was mistaken about that as I didn't see why. At any rate, he said if I could arrange for the switching of the coal he would sell it to me on his track at
218 the stipulated price, I believe it was 25 cents a ton. This conversation occurred at breakfast so immediately, when I went to my office, I called up the L. & N. agent and told him that I had purchased some coal at the Keystone mine and wished that he would place the car as I wanted the coal and he said he would do it and he did do it, and the car of coal was switched around. In a day or two he told me that he was sorry but that he had instructions not to switch any more coal and he wouldn't be able to switch any more coal from the mine, so I only bought the one car. I think that was in the latter part of March 1908.

Mr. M. Yeaman, Att'y for defendant, objects and moves to strike all of the foregoing answer that relates to the conversation with Bosserman.

Q. You did buy a car load of coal from the Keystone Mining & Manufacturing Company?

A. Yes sir.

Q. At whose request was the car for that coal placed?

A. At my request.

Q. Did you at that time make any representations to Mr. Powell or any representatives of the L. & N. Railroad Co., that the Keystone Mine had a car of coal, or any cars of coal loaded for shipment to Owensboro and request the Railroad Company to deliver it to the Henderson Elevator Company in order to relieve the cars of their load?

A. I knew nothing about there being any cars there loaded with coal or anything. All I know was that Mr. Bosserman agreed to sell me the coal at a stipulated price and I called the agent and told him exactly what I wanted; that we wanted the car switched down and I asked him what the switching charges would be, and if I remember correctly, and I think I do, he said they would be $2, and the switching charge was $2, and I paid the $2. The bill was

presented for switching the car, $2, and paid. No question about any car being loaded or my promise to release any car, because I had no interest except to have the car placed there at the plant.

219 Attorney for defendant objects and moves to strike out the whole of the answer *answer*.

Q. Do you know whether the car you ordered placed had been placed at the time you ordered it?

A. No sir, I do not.

Q. At the time you ordered the car placed by the Railroad Company did the Railroad Company make any objection to placing the car?

A. No sir; not at the time.

Cross-examined by M. YEAMAN, for Def't:

Q. You know the plaintiff, Jo. Higdon, do you?

A. Yes sir.

Q. What is his present business?

A. He is in my employ now as Superintendent of my Elevator.

Q. How long has he been in your employ?

A. Quite a number of years.

Q. How long after you ordered this car of coal placed was it that Mr. Powell or some representative or agent of the L. & N. told you that they would not be able to switch cars from the Keystone Mining & Manufacturing Company plant to your Elevator?

A. I should say it was in a day or two. It was almost immediately, perhaps the next day or two after. It was immediately at that time, otherwise there wouldn't have been any question, I would have ordered another car.

Redirect examination by Mr. JAS. W. CLAY, for Pl'ff:

—. Did Mr. Higdon have anything to do with ordering this car placed?

A. No sir; Mr. Higdon knew nothing about it until the transaction was over and I told him the car of coal would be there and to have it unloaded.

(Signature waived.)

STATE OF KENTUCKY,
County of Henderson:

220 I, A. Fitz Gibbon, a Notary Public in and for the County and State aforesaid do certify that the foregoing deposition of C. M. Bullitt was taken before me at the law office of Clay & Clay in the City of Henderson, Ky.; that the witness was first duly sworn by me that the evidence he should give in the action would be the truth; the whole truth and nothing but the truth; that the said testimony of said witness was written by me in shorthand and afterwards transcribed and the signature thereto waived; I further certify that at the taking of said deposition neither party was present

in person; that the plaintiff was present by Mr. Jas. W. Clay and defendant was present by Mr. Malcolm Yeaman.

Given under my hand this October 21st, 1910. My commission expires Jan'y 10, 1914.

A. FITZ GIBBON,
Notary Public, Hend. Co., Ky.

221 Be it further remembered that the defendant objected to question No. 100 on the direct examination of Jo Higdon, which objection was sustained and the Court refused to permit the answer of said Higdon to said question No. 100, to be read, to which the plaintiff objected and excepted.

The defendant objected to the 4th question or interrogatory propounded to the witness L. A. Bosserman, which the Court sustained and refused to permit the answer of said witness to be read, to which the plaintiff objected and excepted.

The defendant objected to the 17th question or interrogatory propounded to the witness L. A. Bosserman, which the Court sustained and refused to permit the answer of said witness to be read, to which the plaintiff objected and excepted.

The plaintiff objected to so much of the answer of C. B. Compton to the 23rd question propounded said witness in his second deposition as related to a conversation had between said witness and a Mr. Nicholson, and moved the Court to strike that part of the answer of said witness from the record, but the objection was overruled, and the Court refused to strike said answer, to which the plaintiff excepted.

The plaintiff objected to the 6th question to the witness C. B. Compton, in his second deposition, but his objection was overruled, to which the plaintiff excepted; the plaintiff then moved the Court to strike the answer of said Compton from the record, but his motion was overruled, to which the plaintiff excepted.

And these were all the errors of which the plaintiff complained in the admission and rejection of evidence to which he reserved exceptions.

The defendant objected to questions and answers, 99, 101, 133, of the deposition of Jo Higdon, but his objection was overruled, to which it excepted; and to question and answers, 6, 8, 13, 14, and 18, of deposition of L. A. Bosserman, but its objection was
222 overruled to which it excepted; and to question and answer #2 of C. H. Bullitt, but its objection was overruled, to which it excepted; and to question 282 of R. W. Powell's deposition, and the letter there referred to, but its objection was overruled, to which it excepted.

Comes now the plaintiff and moves the Court to sign and file this his bill of exceptions and make it a part of the record herein, which is now done on this the 27th day of October 1910, the same being the 46th day of the September Term 1910, of the Henderson Circuit Court.

J. W. HENSON, *Judge.*

On Friday October 28th, being the 47th day of the September 1910 term of court, the following order was entered herein, Viz:

Came the plaintiff and filed its schedule and agreement. It appearing from said agreement that the parties have agreed thereto, it is ordered by the Court that the Clerk attach to the record for the Court of Appeals, the original Terminal Tariff of the Louisville & Nashville Railroad Co. being exhibit No. 10, filed with the deposition of Jos. Higdon, and the original statement of Switching done, filed with the 2nd deposition of R. W. Powell, without copying same into the record, and without being copied in the case.

The Schedule and Agreement referred to in the foregoing order is copied on page 1 of this transcript.

The Exhibits referred to in the foregoing order are hereto attached.

223 STATE OF KENTUCKY,
County of Henderson:

I, W. G. Moseley, Clerk of the Henderson Circuit Court, same being a Court of record in and for the State and County aforesaid, do hereby certify that the foregoing 223 pages contain a true full and complete transcript of the record in the suit wherein The Crescent Coal Company, is plaintiff and The Louisville & Nashville Railroad Company, is defendant as found of record in my office. And called for in plaintiff's schedule.

Given under my hand as Clerk of said Court this the 10th day of December 1910.

W. G. MOSELEY, *C. H. C. C.*,
By WILEY L. DIXON, *D. C.*

224 At the same time and with the foregoing transcript, to-wit, on December 13, 1910 there was filed the following statement of parties:

Appellant's Statement.

Court of Appeals of Kentucky.

JO HIGDON, Doing Business under the Name of Crescent Coal Co.,
Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Appeal from a judgment of the Henderson Circuit Court dismissing plaintiff's petition. The judgment was rendered at the September, 1910 Term, to-wit: Oct. 27th 1910, and may be found at page seventeen (17) of the record.

The appeal was granted by the lower court; no summons or warning order is necessary.

Clay & Clay, Henderson, Ky., Counsel for Appellant.
Yeaman & Yeaman, Henderson, Ky., Counsel for Appellee.

CLAY & CLAY,
Attorneys for Appellant.

December 10th 1910.

225 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort on the 6th day of January, 1911, the following order was entered:

CRESCENT COAL COMPANY
vs.
L. & N. R. R. Co.

Henderson.

Came appellant by counsel and filed statement and motion for oral argument herein, which motion is submitted.

A statement filed by the foregoing order is as follows:

Kentucky Court of Appeals.

JO HIGDON, Doing Business under the Name of Crescent Coal Company, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Motion for Oral Argument.

The Appellant moves the Court to pass this case for oral argument, and grant him an oral argument herein, upon the following grounds:

1. The case involves the construction and application of sections 213, 214, 215, and 216 of the State Constitution, and the Constitutionality of those sections, especially of Section 213, under the Federal Constitution.

2. It also involves sections, 816, 817 and 818, Kentucky Statutes, and the constitutionality of those sections.

3. The Appellant claims that having established a flat rate of four ($4.00) dollars per car for handling freight between industries in the terminal limits of Henderson, Kentucky, and having accepted and transported freight for some shippers connected by switch or sidings with its road, it was Appellee's constitutional, statutory and common law duty to accept and transport for all, having similar connections and facilities.

4. The Appellee claims, among other things that it is not controlled in the operation of its terminal facilities, by the same
226 law which controls it in its operation between stations.

5. The amount involved is between seven and twelve thousand dollars.

6. The case presents questions which are not only of supreme importance to the Appellant, but the Court's final decision is also of great importance to all shippers and manufacturing industries

in Henderson, whose plants have switch connection with the railroad, of which there are a large number.

Respectfully submitted,

CLAY & CLAY,
Attorneys for Appellant.

We waive notice of the above motion, and join in the request for an oral argument of the case, but do not agree that the questions involved are correctly or fully stated.

YEAMAN & YEAMAN,
Attorneys for Appellee.

Jan. 2nd, 1911.

Filed Jan. 6 1911. Napier Adams, C. C. A.

227 Afterwards at a Court of Appeals held as aforesaid on the 11th day of January, 1911, the following order was entered:

CRESCENT COAL CO.
vs.
L. & N. R. R. Co.

Henderson.

The court being advised, appellant's motion for oral argument herein is sustained.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid on the 7th day of February, 1911, the following order was entered herein:

CRESCENT COAL CO.
vs.
L. & N. R. R. Co.

Henderson.

Came appellant by counsel and filed motion and allowed to withdraw brief herein and filed printed copies in lieu thereof; and case came on to be heard and was argued by C. H. Moorman for appellee and J. W. Clay for appellant submitted.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid on the 18th day of March, 1911, the following orders and judgments were entered:

CRESCENT COAL COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Appeal from Henderson Circuit Court.

The court being sufficiently advised it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed and cause remanded for a new trial in conformity with the opinion herein. Which is ordered to be certified to said court.

It is further considered that appellant recover of appellee all its cost herein expended.

228 At the same time, to-wit, on March 18, 1911, the Court of Appeals of Kentucky delivered an opinion in words and figures following, to-wit:

229 Court of Appeals of Kentucky.

MARCH 18, 1911.

CRESCENT COAL COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Appeal from Henderson Circuit Court.

Opinion of the Court by Judge Carroll—Reversing.

The appellant, Crescent Coal Company, is the business name assumed by Joe Higdon who in 1908 was engaged in buying and selling coal in the city of Henderson. The appellee Louisville & Nashville Railroad Company was at the time and is a corporation organized under the laws of Kentucky and engaged in the business of a common carrier of passengers and freight. Its main line of road runs into and through the city and in addition to its main line it operates and controls what is called a belt line, running from its main line in two directions through the city. Leading from its
230 main and belt line, there were a number of spur tracks that run into various industrial plants in the city of Henderson, situated near its main and belt lines of road. These spur tracks were used for the purpose of transporting freight to and from these industrial plants, and were operated by the company as a part of its line of road. The Keystone Mining & Manufacturing Company was engaged in the operation of a coal mine in the city of Henderson, and was connected with the main or belt line by a spur controlled and operated by the appellee company.

In April 1908 Higdon in the name of the Crescent Coal Company conceived the plan of supplying the industrial plants in the

city of Henderson that had spur connections with the main or belt line of the appellee company with coal mined from the Keystone mine. His purpose was to have cars furnished by the appellee company loaded with coal at the time, and then transferred by the appellee company to the industrial plants in Henderson that had spur connections. With this object in view, he entered into a contract with the Keystone company,—by the terms of which he was to be furnished by it during the year beginning July 1st, 1908, 20,000 tons of coal, which it was stipulated in the contract should be delivered to him on the spur track at its mine. Another contract made in May, 1908, gave him the right with certain condi-
231 tions to sell the output of the mine in excess of 20,000 tons.

After making these contracts with the Keystone Company, he contracted with various industrial plants having spur connections with the line of the appellee company to deliver to them at their plants in carload lots, at a stipulated price, a large quantity of coal. On July 1st, 1908, he applied to the appellee company to furnish him cars at the Keystone Company's mine to be loaded with coal and hauled by it to the industrial plants, and proposed to pay for the services four dollars per car, which would be about ten cents per ton. The appellee company refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish cars but would charge for the service fifty cents per ton. This offer, which was kept open until August 13th, 1908, Higdon refused to accept, and on August 13th, the appellee company informed him that it would not furnish cars for this service at any price. Thereupon Higdon brought this suit against the appellee company, setting up his contracts, and the action of the appellee in preventing him from fulfilling them, and sought to recover damages to compensate him for the loss he had sustained. The action was brought on the ordinary, or common law, side of the docket, but on motion of the appellee company was transferred over the objection of the appellant to equity, and upon hearing, the
232 petition was dismissed.

A number of legal questions are presented by the record, and we will endeavor to dispose of such of them as seem essential to a solution of the matters in controversy. The first, and perhaps the most important question, is: Was the appellee company under a duty as a common carrier of passengers and freight to render this service?

The evidence for appellee conduces to show that the coal mine and the industrial plants located in Henderson to which Higdon desired to deliver coal were all located within what are called the "switching limits" of the appellee company. It is therefore said that it should not be treated as a common carrier or charged with the duty of transporting freight as a common carrier from one point within these limits to another point within them. A common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs and side tracks for its convenience in the handling, storing and distribution of its cars and freight, and it would not be obliged as a

common carrier to transport from one point to another in these yards or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard.
233 In the use of tracks laid in its yards for its own convenience in handling, storing and distributing cars and freight, a common carrier cannot fairly be said to be engaged in the business of a common carrier in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common carrier and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals and other places where the business requires it, yards and facilities that they may use in the conduct of their business, in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers. But, we are not inclined to treat what the appellee company terms its "switching limits" in the city of Henderson as coming within the meaning of yards and terminals, such as we have described. The spur tracks to the coal mine and the industrial plants were not constructed, nor were they operated for the convenience of the appellee company in handling, storing and distributing its cars, engines and other property. As we will presently show, they were constructed and were being used as a part of its railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. It is true these spur tracks were
234 within what it called its "switching limits" and extended to factories and mills situated close to its line of road, but we regard as wholly immaterial, in the consideration of the question before us, the length of the spur track, or the kind of business establishments it connects the line of road with. Nor do we consider it a matter of any consequence how close together spur tracks, such as these, are located, or whether they are upon one part of its line or another. Whether they run to factories or mines in cities or towns, or to industrial plants in country districts, whether they are long or short, or close together or widely separated,—they are to be considered a part and parcel of the system constructed and operated in its business as a common carrier, and the public have an interest in their conduct and operation that the carrier must respect. A railroad company owes to establishments connected with its line of road by these spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike. Nor can a railroad company arbitrarily and without any relation to the use to which it is put designate a part of its track or system as "yards or switching limits" and then say that it owes no duty as a common carrier in
235 this district except such as it may choose to assume, or, say that it will or not as suits its pleasure or convenience perform service as a common carrier in this territory. A railroad company engaged in the general business of a common carrier can-

not without regard to the convenience of the public classify or divide its trackage into divisions or parts and say that on one part it is a carrier and on another it is not. In the discharge of its duties to the public as a common carrier, a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and cannot be required to receive or handle it at other places; but, it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage. The spur tracks to these various plants in Henderson were no more a part of its "yards or switching limits" than would be a spur track that connected its main line in a country district with a mill or factory.

It is shown by the evidence that the appellee company in 1908, and for a number of years prior thereto, had been in the habit of transporting carloads of freight from industrial plants in Henderson with spur connections to other industrial plants in Hen-
236 derson with spur connections, but that it had never performed this service for the Keystone company. For example, it would haul a carload of corn from an elevator, connected with its belt or main line by a spur track, to a mill connected with its main or belt line by a spur track; but, it would not haul a carload of coal from the mine to either the elevator or the mill. In explanation of this practice, and for the purpose of showing that it involved a different character of service from that sought by Higdon, it attempted to show and did so do by its traffic agents, that the service it performed in hauling products from one industrial plant to another, such as from the corn elevator to the mill, was merely auxiliary or incidental to a transportation service that preceded or followed this local movement. Or, in other words, when it hauled for a nominal charge a carload of corn from the elevator to the mill to be converted into foodstuff of some kind, this foodstuff would necessarily be sold to parties outside of Henderson and therefore it would get what it calls a transportation charge for hauling the food product from the mill at Henderson to the place it was shipped. And so it would be compensated in the transportation haul for the service it rendered in switching the cars from the elevator to the mill at a nominal price. It is said, however, that if coal was
237 hauled from the Keystone mine to a factory to be there consumed, the carrier could not get another haul out of this coal or the substance to which it was reduced, and therefore it had the right to decline to render in the transportation of coal the character of service that it rendered in the transportation of corn. Looking at this question from the standpoint of the traffic manager of the appellee company, it doubtless presented to his mind sufficient reasons why the discrimination should be made. But, when considered in relation to the duties a common carrier owes to the public, it was wholly unjustifiable. A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and if it was only engaged in the carriage of specified articles, it would not be under any obligation to carry other things. If it carried for every person, who offered it,

the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, Vol. 1, sections 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of
238 freight offered to it. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky., 728. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson and this was well known to Higdon when he made the contracts referred to, but this custom did not confer upon it the right to continue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon, did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat and other articles and refuse to transfer under the same conditions coal.

It follows from these conclusions that the appellee company was not justified in refusing to render the service requested by Higdon.

The next question is—what rate did it have authority to charge for his service? In April, 1908, the appellee company published and issued a book containing its tariff rates. In this book we find the following: "The Louisville & Nashville Railroad Com-
239 pany does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Kentucky, terminals, but where any such service is performed as an accommodation, a charge of two dollars per car plus two dollars for car rental shall be assessed." This tariff rate was in force from May 4, 1908, until after July 1909. It was this rate that Higdon demanded that the appellee company should charge for the service he requested. The railroad company however, insists that this tariff rate was not intended to and did not embrace the character of service Higdon desired. Its general traffic manager testifies that this provision in its tariff sheet was made for the sole purpose of fixing a rate at which it would transfer cars between warehouses or industries that it had hauled from other points to Henderson, or that were loaded at Henderson for shipment to other places. For example, if a carload of freight was shipped from Memphis, Tennessee, to the Henderson mills at Henderson, it would charge the regular transportation price from Memphis to its depot in Henderson, and in addition, $4.00 for delivering the car from the depot to the Henderson mills on the spur track that run into its establishment. Or, if a carload of food product was delivered to it by the Henderson mills on the spur in a car furnished for that purpose, it would charge four dollars for carrying this car
240 from the mills to its station in Henderson, and in addition charge the regular traffic rate for hauling it from there to the point of destination. In other words, the rate did not cover or con-

template a service in which a long haul did not follow or precede the movement of transferring the car to or from an industry in Henderson to its depot. Based on this theory, it is argued that the appellee company had not established or put in force any rate for the service demanded by Higdon at the time he requested it, and so it had the right to afterwards fix the rate at fifty cents per ton, which it did on July 13. It is further said that this rate was reasonable, and as Higdon declined to accept the service at this price the company was thereby relieved from liability to him, unless he first brought the matter to the attention of the Railroad Commission and obtained from that body a ruling that the rate was not reasonable. If it were true that the appellee company had no fixed or established rate that covered this service at the time it was requested, we have no doubt of its right to fix a reasonable rate. We are further of the opinion that if the rate so fixed was reasonable and Higdon declined to accept it, he would not have any cause of action against the company growing out of the state of facts set up in his petition. Whether it is a condition precedent to the bring-
241 ing of an action for damages on the ground that a rate fixed for a particular service is unreasonable, that the shipper must first obtain a ruling from the Railroad Commission, it does not seem necessary to decide in the view we have of the case. It will be observed that the tariff rate previously quoted recites that the railroad company does not engage in the business of local switching between switches, tracks, warehouses and industries in Henderson. But we have already determined that this declaration of what service it would perform did not authorize it to refuse to carry coal from the mine to the warehouse and industries in Henderson having spur connections. Therefore, so much of the provision as asserts that it will not perform this service need not be further noticed. If the rate fixed was only for service rendered incidental to and in connection with a transportation service from which the company derived a benefit, and it was only a reasonable rate when considered in connection with the additional rate charged for transportation service, there would be much force in the argument that it was not a reasonable rate for the carriage of coal from the Keystone mine to industries in Henderson, as the company would get no other compensation from this service. But, conceding this, we are unable to relieve the company from the condition in which it volun-
242 tarily placed itself under the mistaken assumption that it was not required to render at all such service as Higdon requested. Undoubtedly the appellee company had the right to classify freight and make a reasonable difference in its charges for different kinds of freight transferred to or from one industry to another in Henderson. Its authority to make this classification and to fix different rates was as extensive as its authority to classify and charge different rates for different kinds of freight transported from one point to another outside of Henderson. But, in publishing its tariff rates for the information and use of the public, it did not stipulate for different rates or make any classification. It said in substance that when it transferred cars from one industry to another in Henderson it would charge for the service four dollars.

Having thus established and promulgated the rate it would charge without any attempt to designate the character of freight it would transport for this charge, we do not feel authorized to interpret this rate as meaning that it would be charged for corn or flour or meal and not coal, or to limit its application to any particular article. The appellee company is bound not only by its published rate, but by its course of conduct under this published rate. It is shown by the evidence that for many years and whenever requested it trans-
243 ferred from one mill or industry to another mill or industry in Henderson, connected by spur tracks with its main or belt line, carloads of freight of different kinds and charged for this service the established rate. So if there was doubt about the meaning of this published rate, or the character of service it applied to, we find that the appellee company in its course of business construed it to mean that it was under a duty to or at least would for the charge named transfer loaded cars of freight from one factory or mill to another. Under these facts it was plainly a discrimination against Higdon to refuse to perform the service for him at the price charged to others for a like service. Union Pacific R. Co. vs. Goodrich, 149 U. S. 680; 37 L. Ed. 896; Alabama & V. R. Co. v. Railroad Commission, 203 U. S. 494, 51 L. Ed., 289. If the appellee company had confined the transfer service to such service as was incidental to transferring cars of freight to and from its depot to mills and industries, there would be much force in the contention of counsel, but as it did not pursue this course of conduct we must treat the case as we find it and as it was made by the appellee company. The rate as published covered all service, and did not specify what character of freight it applied to or make any distinction between corn and coal. If under this rate it was obliged to or did in its course of
244 dealing transfer wheat, corn or other produce for certain persons from one point in Henderson to another, then it was obliged to perform this service upon the same terms and conditions for all persons demanding it, without reference to the class of freight hauled. Constitution, sections 214, 215. In the absence of a tariff or rate classification by the appellee company we cannot say that a higher rate should be charged for hauling coal than should be charged for hauling corn or wheat. Further insisting on its right to make a distinction between these articles and to support the contention that the published rate was not intended to and did not apply to coal, it is said that when it hauled a car of freight from a mill or industry or from one industry to another in Henderson, it did so with the expectation that the freight so transferred would be converted into some article by the mill or industry receiving it and then shipped to points out of Henderson over its line,—thus giving it what it calls a transportation haul or a haul out of which it would be compensated for the transfer service from factory to mill. This contention is entirely lacking in merit. It might be argued with as much force and relevancy to the issue that as the mills could not be operated without coal, therefore it should haul coal from
245 mine to the mill so that produce might be manufactured that the appellee company could haul to points outside of Henderson.

We have examined the case of Dixon v. Central of Georgia R. Co., 110 Ga., 173, 35 S. E., 369, but do not find it applicable to the state of facts presented by the record before us. In that case the question before the court was whether or not the service was "transportation service" or "switching service," and under the facts of that case it was held to be "transportation service," and therefore the charge established for "switching service" was not applicable. In the case we have, our conclusion that the rate of four dollars per car was applicable to the service demanded, although it is described in the tariff sheet as "switching service," is largely rested upon the ground that the company charged this rate to other shippers for a like service. In the Dixon case it does not appear that the question that influenced our decision upon this point was before the court. If the question of the applicability of the tariff rate we have quoted was submitted to us freed from the construction given to it by the appellee company in its dealings with reference to the transfer of freight between other industries, we would say that it did not apply to the service sought by Higdon. It seems to us that the service Higdon desired was not "switching" but "transportation" service. *It seems to us that the service Higdon desired was not "switching" but "transportation" service.* It was the same kind of service that the appellee company would have performed if a car was loaded with coal at a mine at any point on its road, and then hauled to the customer to whom it was consigned. But the appellee com-
246 pany in its course of conduct treated what might properly be called "transportation service" as "switching service," and applied to it the rate it now claims is only applicable to "switching service." This being so, we again repeat that it cannot be allowed to make any discrimination between Higdon and others similarly situated.

Coming now to the amount of damages Higdon is entitled to recover,—he had two contracts with the Keystone company. In one contract dated April 5, 1908, it agreed to furnish to him during the year not more than 20,000 tons, and it was in reliance upon this contract and the four dollar rate he anticipated the appellee company would charge that he contracted to furnish to various industries about 14,000 tons. He also had other contracts to furnish
247 coal to industries having spur connections, made before the contract with the coal mine, that it appears he could have filled with its coal. By the terms of the other contract, made in May, 1908, the Keystone Company appointed Higdon its sole agent in the City of Henderson to sell for it in the city coal in carload lots. But this contract stipulated that—

"The first party (Keystone Company) does not obligate itself to furnish for or on account of the second party (Higdon) under this contract any given quantity of coal, nor shall it be required to furnish any coal which shall interfere with the supply of coal on the local market in less than carload lots or by wagon loads. It being the mutual understanding that the first party shall supply its local trade by wagon delivery, shall fill the contract made with the Crescent Coal Company, signed by said Joe Higdon, and if then

it has any coal on hand the said Joe Higdon shall have the refusal and the first party shall not have any right to ship it elsewhere if the second party should desire to use it under this contract in carload lots."

It will be observed that it was virtually optional with the Keystone Company whether it furnished Higdon any coal under the May, 1908, contract, and upon the record before us we do
248 not think he is entitled to any damages under this contract, as it does not appear that on the faith of it he made any contracts that caused him to suffer any loss. On the contract made in April he is entitled to recover the difference between what it cost him to fill the contracts he had made, whether before or after July 1, 1908, with industries having spur connections, and that he could have filled with coal from the Keystone mine between July 1st, 1908, and July 1st, 1909, and what it would have cost him to fill these contracts if he had obtained coal from this mine. As it appears that this mine ceased operations before July 1st, 1909, the damage should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that he could have furnished in fulfillment of the contracts made with customers before that time. Upon these issues, the appellant was entitled to a jury trial.

Wherefore the judgment is reversed for a new trial in conformity with this opinion.

Clay & Clay, for Appellant.

Charles H. Moorman, Yeaman & Yeaman, Benjamin D. Warfield, for Appellee.

[Endorsed:] March 18, 1911. Crescent Coal Co. v. L. & N. R. R. Co.

249 Afterwards, to-wit, on the 12th day of April, 1911 at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid the following order was entered, to-wit:

CRESCENT COAL CO.
vs.
L. & N. R. R. Co.

Henderson.

Came appellee by counsel and filed motion for 30 days' extension of time to file petition for rehearing herein which motion is submitted.

Afterwards, to-wit, on the 13th day of April, 1911, at a Court of Appeals held as aforesaid the following order was entered:

CRESCENT COAL CO.
VS.
L. & N. R. R. Co.

Henderson.

The court being advised, the appellee's motion for 30 days' extension to file petition for hearing is sustained.

Afterwards at a Court of Appeals held as aforesaid on the 14th day of April, 1911 the following order was entered:

CRESCENT COAL CO.
VS.
L. & N. R. R. Co.

Henderson.

Came appellant by counsel and filed petition and moved for a modification and extension of the opinion herein, which motion is submitted.

The petition of appellant for modification and extension of opinion filed by the foregoing order is in words and figures following, to-wit:

250 Filed Apr. 13, 1911. Napier Adams, C. C. A.

Court of Appeals of Kentucky.

39669.

CRESCENT COAL CO., Appellant,
VS.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Appellant's Petition for Modification and Extension of Opinion.

May it Please the Court:

We regret that our client's interests require us to ask the Court to modify or extend the able and exhaustive opinion delivered by this Court in this case. There are, however, two questions,—one of which is briefly mentioned in the opinion, and the other not discussed at all, which we ask the Court to consider, in order that, on a second trial, the plaintiff's rights may not be unduly curtailed.

First. At almost the end of the opinion the Court says:

"As it appears that this mine ceased operations before July 1st, 1909, the damage should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that he could have furnished in fulfillment of the contracts made with customers before that time."

251 Now, there is already in the record before this Court, evidence tending to show that the closing down of this mine was due to the failure and refusal of the railroad company to furnish cars in which to deliver the coal; that it would not have shut down but for this fact, but would have continued operations for the full time of plaintiff's contract, and that contract would have been filled. On another trial we are satisfied this fact can be conclusively established. If it is so established, to the satisfaction of the jury, then we submit that plaintiffs should not be limited to the time of closing down the mine, but should be permitted to recover for the full term of his first contract.

In addition to this, the Keystone Mining & Manufacturing Co. is now, and was at the time it ceased operations, perfectly solvent, and was then and is yet the owner of the plant. If the railroad company had furnished the cars and performed the service asked, the Keystone Company would have furnished the coal, or if it failed to do so, could have been made to do so, or respond in damages. If it should now be sued on the contract, a complete defense would be that the railroad company refused to furnish the cars.

So that, from either viewpoint, the loss to the plaintiff, if he sustained any, after the plant shut down, is the direct and proximate result of the failure of the railroad company to perform the service demanded.

Looking at the opinion, we conclude that the Court must have reached the conclusion that the Keystone Company went out of business, or disposed of its plant, or became insolvent, none of which things occurred. It was and is amply able to perform every contract made, or obligation undertaken.

We ask the Court, therefore, to so extend its opinion, as to permit the submission of this phase of the case to the jury, under proper instructions.

Second. The petition prays for the allowance to plaintiff
252 of reasonable attorneys' fees to be fixed by the court.

This Court in its opinion holds that it was a discrimination against the plaintiff not to furnish the cars and perform the service in question. Section 819, Kentucky Statutes, provides that in such cases,

"Such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees, to be fixed by the court."

In prescribing the criterion of recovery, this Court does not in its opinion, say whether the plaintiff is, or is not, entitled to reasonable attorneys' fees, and we ask an extension of the opinion to cover this point.

We will not impose upon the patience of the Court by discussing either of these questions at length. They were in the case on the former trial, and will be in the case on a second trial. This Court having instructed the lower court as to plaintiff's criterion of recovery, the trial court will, we are satisfied, follow those instructions literally, and will naturally hold, that the opinion of this Court

is binding, not only as to questions presented, but as to questions which might have been presented.

We therefore ask the Court to modify its opinion upon the first question here suggested, and to extend its opinion so as to cover the second question here presented.

Respectfully submitted,

CLAY & CLAY,
Attorneys for Appellant.

253 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky as aforesaid on the 19th day of May, 1911, the following order was entered:

CRESCENT COAL CO.
vs.
L. & N. R. R. Co.

Henderson.

Came appellee by counsel and filed petition and moved for a rehearing and modification of the opinion herein, which motion is submitted.

The petition of appellee filed by the foregoing order is in words and figures following, to-wit:

254 Court of Appeals of Kentucky.

CRESCENT COAL COMPANY, Appellant,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellee.

Petition for Rehearing and for Modification of Opinion.

The obligation imposed upon the railroads of this State by the opinion of the court, of March 18 (143 Ky. 73), are, we think, so unreasonable and radical, in the light of the policy of this country in its treatment of railroads as carriers, as to warrant our petitioning the court for a rehearing of this cause and for such a modification of the opinion as will preserve in this State such of those reasonable rights and obligations between railroads and shippers as are fair and just to both alike.

I.

Was it the duty of the appellee company, as a common carrier, to engage in the business of hauling freight between spur tracks and sidings at the Henderson station and in the Henderson Terminals?

Before entering upon a discussion of the legal questions involved in the case, the court, in the opinion, raises what it de-
255 nominates as "perhaps the most important question" in the case, viz: "Was the appellee company under a duty as a common carrier of passengers and freight to render this service?"

This question being answered in the affirmative, there necessarily arose, under the evidence in the case, a second question, viz: "What rate did the appellee have authority to charge for the service?" Obviously, except for the first question's being answered in the affirmative by the court, the second question would not be material. It is, therefore, to the question as to whether or not it was the duty of the appellee as a common carrier of passengers and freight to render the service demanded by the appellant that we desire, at this point, to direct the court's attention. In discussing that question, the opinion starts out with the proposition that—

"a common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs and side tracks for its convenience in the handling, storing and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard. In the use of tracks laid in its yards for its own convenience in handling, storing and distributing cars and freight, a common carrier can not fairly be said to be engaged in the business of a common carrier in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common
256 carrier and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals and other places where the business requires it, yards and facilities that they may use in the conduct of their business, in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers."

Following the foregoing language, the court declares:

"But we are not inclined to treat what the appellee company terms its 'switching limits' in the city of Henderson as coming within the meaning of yards and terminals, such as we have described."

In support of this conclusion, the opinion goes on to emphasize the position it assumes, that the spur tracks to the coal mine and the industrial plants were not constructed, nor operated, for the convenience of the railroad company in handling, storing and distributing its cars, engines and other property, and states that said tracks were constructed and were being used as a part of appellee's railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. The conclusion of the court on this point, stated generally, is that a railroad company owes to establishments connected with its line of road by these spur tracks the same duty that it owes to establishments situated immediately upon its main line of road.

Following that general statement, the proposition is laid down by the court that—

257 "in the discharge of its duties to the public as a common carrier, a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and can not be required to receive or handle it at other places; but, it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage."

(The latter part of the quotation we shall refer to later. It is put in here in order that the full meaning of the first part of the quotation will appear.)

Then the court's conclusion on that point in this particular case is stated as follows:

"The spur tracks to these various plants in Henderson were no more a part of its 'yards or switching limits' than would be a spur track that connected its main line in a country district with a mill or factory."

Thus it will be seen that the opinion concludes that if the spur in question came within the meaning of yards and terminals such as a carrier uses for its convenience in handling, storing, and distributing cars and freight, the appellee could not be said to be a common carrier in the sense that it must receive and deliver freight at such point. Therefore, it is important to ascertain what constitutes such "switching yards" and terminals, and what reasons there are for designating certain switches and spurs as "switching yards" and terminals wherein a railroad is not obliged to engage in the business of a common carrier, and whether such reasons
258 apply to the spur in question and other private spurs in the Henderson yard.

Undoubtedly a "switching yard," in railroad parlance, and by judicial construction, consists of side tracks upon either side of the main track, and adjacent to some principal station or depot grounds, where cars are placed for deposit, and where arriving trains are separated and departing trains made up. It is a place where such switching is done as is essential to the proper placing of cars either for deposit or for departure, also for the storing, distribution, and delivery of cars and freight. The term "switching yard" is synonymous with "railroad yard." (B. & O. S.-W. R'y Co. v. Little, 48 S. E., 862; Harley v. L. & N. R. R. Co., 57 Fed. 144.)

We should bear in mind that the Keystone switch was built, not for the public, but as a private siding for the convenience of the Keystone Company and with the express understanding that the railroad company would receive cars on the switch only where the cars had come into Henderson, consigned to the Keystone Company, or where the cars were to be loaded by the Keystone Company and were to be shipped to points outside of Henderson.

The public had no right to or interest in the switch. It was purely a private switch, built upon the terms and conditions mentioned. In reaching the conclusion that the Keystone switch was not included in the yard at Henderson, the court states certain matters considered by it on that point, but fails to take cognizance of

certain controlling facts, which, in our judgment, demon-
259 strate the incorrectness of the court's decision. The Key-
stone switch is a part of the "switching yard" or "railroad yard" in Henderson, not merely because of the length of the switch, nor of the kind of industry with which it connects the line of railroad, nor of its proximity to other tracks, nor of its location in a city, nor of the particular line upon which it is located, but because it was built and is used as a part of the switching yard or railroad yard, for receiving and distributing freight at the Henderson station, and it was not built and it is not used for the purpose of hauling or transporting from one depot or point of origin to another depot or point of destination. The appellee does not, and did not in the case at bar, arbitrarily or without any relation to the use to which they are put, mark off or designate its switching yards or switching limits in Henderson; the use is what determines the designation and the limits. Coal or other freight received or delivered on the Keystone spur has never been, and is not, treated as originating or terminating on that spur. It is in every respect treated as originating or terminating at the station of Henderson, Kentucky. All freight delivered to or received from the Keystone spur was billed to or from Henderson, Kentucky. Mileage and other statistics of such freight were compiled just as though the point of origin or destination was merely Henderson, Kentucky; and, doubtless, no billing ever mentioned delivery or origin on the spur. The rates were made to and from Henderson, and the distance between
the Henderson depot and the spur was not considered either
260 in making the rates or in computing the mileage statistics in the appellee's accounting department. The spur was under the immediate jurisdiction of the freight agent at Henderson, Kentucky,—just as the freight depot is under his jurisdiction. This spur was merely a place for the convenient receipt and delivery at Henderson, Kentucky, of carload freight forwarded or received by the Keystone Mining Company, just as the team tracks are places for the convenient receipt and delivery at Henderson, Kentucky, of carload freight forwarded or received by other shippers or consignees, and just as the freight platforms at the depot are places for the convenient receipt and delivery of less-than-carload freight shipped by or to other Henderson shippers and consignees. To the same extent that the Keystone spur is to be considered "a part and parcel of the system constructed and operated in its business as a common carrier," so is the depot to be considered, and so are the team tracks, ladder tracks, and such other tracks to be considered. In fact, the team tracks and the station platforms are for public use; whereas, the Keystone spur is for private use only. Team tracks are used for the public receipt and delivery of carload business. Different parts of the depot are used for the public receipt and delivery of less-than-carload business. If transportation must be performed between private sidings in the same yard, such as the siding of the Keystone Company, it must a fortiori be performed between team tracks in the same yard; and if it must be

performed between team tracks, it must be performed be-
261 tween different platforms or different bins in the same station.

We are considering, at this time, the question of whether it is the duty of a railroad company to engage in the business of transporting freight between private spurs in the same terminals or at the same station, and, for the purpose of the argument on this point, we must assume that the appellee has never hauled any grain or other product between spurs in the Henderson terminals, but that such spurs have been used solely for the purpose of receiving and delivering carload freight consigned from, or destined to, points outside of Henderson. Proceeding along that line, and bearing in mind that the Keystone spur track is for private use only, and is, in fact,—like all other private spur tracks in Henderson,—a private team track, the case, then comes to this question: Was the appellee in its character of common carrier obliged to accept a shipment of freight tendered to it at one team track in the Henderson terminals and transport the same to another team track in the same terminals? Suppose the appellee had two public team tracks in the city of Henderson: Could it be said that it was the duty of the appellee to place a car for the loading of freight on one of those tracks and to transport the car to the other track, for the delivery of the freight? Certainly the business of a common carrier and the obligations of a common carrier to the public are not such as to require a service of that kind. And, yet, that service is compellable from the appellee if it can be compelled to transport freight between private team tracks or private spurs at the same station.

262 We have not lost sight of the contention that the appellee performed the service of intra-urban transportation on grain and milling products between mills and elevators at Henderson. That point is not applicable here, as it goes mainly to the contention of an unjust and unreasonable discrimination against the Crescent Coal Company, which contention we shall refer to later. The appellee, in the discharge of its duties to the public as a common carrier, had the undoubted right to establish regular depots or places at which it would receive and deliver freight, and it could not be legally required to receive or handle freight at other places. This proposition is conceded. In the case at bar, it established a depot, with team tracks, at Henderson, for the reception and delivery of freight coming into and going out of Henderson. By the establishment of the Keystone Company's spur, that company acquired a private track at the Henderson station, on which to deliver and receive carload freight; but it is inconceivable how the use of such a track by the Keystone Company could enlarge the scope of the appellee's duty, as a common carrier, to that company to the extent of imposing upon the appellee the duty of carrying freight between the Keystone spur and other private spurs at the Henderson station, which were established for the same purpose as that of the Keystone spur. It is said that "the spur tracks to these various plants in Henderson were no more a part of its 'yards or switching limits' than would be a spur track that connected its main line in a country

district with a mill or factory." This proposition is unques-
263 tionably correct so far as it applies to the movement of freight from points outside of the Henderson terminals to the Keystone spur, and from the Keystone spur to points outside of the Henderson terminals. But let us illustrate: Suppose there were a mill or factory connected by a short private spur track with appellee's line at a small station in a country district, and suppose that another mill was situated on the opposite side of the main line, with a similar spur track, diverging from the main line at a point immediately opposite to the divergence of the first-mentioned spur: Would it be the duty of the appellee to accept and transport freight from one spur to the other spur? Manifestly, no; because such spurs are intended merely for the convenience of the industries located thereon, in the loading and unloading of freight consigned to that point from some regular, public station or destined from that point to some regular, public station on the railroad. They would merely be places for the convenient receipt and delivery at that station of carload freight forwarded or received by the industries located thereon. Again, suppose such a mill or factory were connected with appellee's main line by two such spur tracks, diverging therefrom within a few feet of each other: Could it be said that it was the duty of the appellee, as a common carrier, to engage in the service—establishing a regular rate therefor—of carrying carload freight from a point on one of said spurs to a point on the other spur? We submit that it would not be the duty of the appellee, as a common carrier, to engage in such service. The supposed
264 cases are identical in principle with the service the appellant seeks to enforce in the case at bar. If the opinion in this case is susceptible of the construction that it is the duty of a railroad company, as a common carrier, to engage in the business of transporting freight between private spurs and sidings and between public team tracks at the same station and in the same terminals—and it would seem that the opinion clearly so holds,—then, a railroad company can not permit a private spur connection with one of its tracks in its yards—either where the connection is surrounded by other spurs or sidings used exclusively in the storing of cars and the making up of trains, or at any other point in its yards—without incurring the obligation of engaging, as a common carrier, in the hauling of freight between such a spur and industries located on other similar spurs at the same station and in the same terminals. Thus, it will be seen that the inevitable result of the practical application of the doctrine would be that a railroad company could not establish reasonable depots or places between which it would transport freight, but that it could be required to transport freight between all industries situated on the same spur and between all spurs at any station and in any terminals; and there would necessarily be a large number of depots or stations in every terminal between which the railroad company could be required, as a common carrier, to haul freight.

Again, as we have pointed out, the use to which sidings and spur tracks are put determines their character. That use is determined

by the railroad company in the operation of its road and the
265 discharge of its duties to the public. The fact that the Keystone spur and other such spurs at Henderson were "a part and parcel of the system constructed and operated in its (appellee's) business as a common carrier" in nowise imposed upon the appellee the duty of engaging in transportation service between such switches. So, also, are those side tracks exclusively used for the purpose of depositing and storing cars at Henderson a "part and parcel of the system constructed and operated in its (appellee's) business as a common carrier;" and it is admitted that it is no part of the duty of appellee to perform transportation service between such side tracks. It is perfectly competent for a railroad company to designate at a station one spur track where it will deliver freight and another where it will receive freight for transportation; and it could not, in that case, be required to receive freight for transportation at the delivery track or to deliver freight at the receiving track. It may even designate certain spur tracks upon which it will receive and deliver certain kinds of freight, and other such tracks upon which it will receive and deliver other kinds of freight. And it is also competent for a railroad company to designate one track for the receipt and delivery of less-than-carload freight for the public generally, and another track where it will receive and deliver carload freight for a particular industry. This is exactly what was done in the case at bar, the spur in question being a convenient place for the reception and delivery of freight by the Keystone Company.

It is inconceivable how the designating of that spur as the
266 place for the receipt and delivery of freight by the Keystone Company should impose upon the appellee the duty of furnishing transportation service between that spur and other similar spurs at Henderson. The Keystone spur was merely a part of the appellee's facilities at Henderson for the reception and delivery of cars and freight consigned to and destined from Henderson, and was, we submit, as much a part of the appellee's switching yards or terminals as were the other side tracks at that point that were used in distributing and storing cars.

Independently of whether the spur in question was within the "switching yard" of the appellee, as that term is defined in the opinion, there was, we submit, no legal obligation on the part of the appellee company to furnish the service demanded. The spur was constructed for the private use of the Keystone Company, with the understanding that it was to be used by that company for the convenient receipt and delivery, at Henderson, of carload freight coming into or going from the Henderson station. Manifestly, the appellee could not undertake to carry for all, to and from such a spur. (Bedford-Bowling Green Stone Co. v. Oman, 134 Fed. 441.) The spur was within that territory embraced by the Henderson station. Other shippers in the same territory at Henderson, not having spurs at their places of business, were required to haul their freight to and from the public team tracks or the freight depot. As to such shippers, the freight depot and team tracks were regular

points for the reception and delivery of freight. Certainly
267 such shippers could not deliver freight to the appellee at its freight depot and require the appellee to transport it to a team track for that station, or deliver freight at one team track and require the appellee to transport it to another team track. It is inconceivable, therefore, how industries situated on spurs at that station, used solely for the purpose of loading and unloading freight, would be entitled to the service.

Respecting the scope of a carrier's duty with reference to its obligation to carry, there is, we maintain, no authority for the contention that it is the duty of a carrier to furnish transportation service between two points in a territory wherein it has established a station for the delivery and the reception of goods consigned to or shipped from that territory. It must be admitted that the duty of a common carrier "is limited to accepting and carrying property of such kinds, to and from such places, as it publicly professes and undertakes, or is accustomed, to carry, and has the facilities for so doing." (Moore on Carriers, p. 98.) Its right to restrict and limit its duty of carriage is, of course, subject to the rule that the restrictions and limitations are to be kept within the bounds of good faith and fair and reasonable conduct. It not only has the right to restrict itself to accepting and carrying property of such kinds as it publicly professes and undertakes, or is accustomed, to carry, but has the right to restrict itself to carrying to and from such places as it publicly professes and undertakes to carry. It may restrict its car-
268 riage of a certain traffic to carrying from one place to another; or between certain stations, shown on its station list, at which its regular freight trains stop; and in that event it would not be bound to carry between two side tracks located in the territory served by that station. The power of reasonable limitation and restriction on the part of the carrier is uniformly recognized by the authorities. This was fully elaborated in our original brief. It is unnecessary for us again to cite authorities sustaining that point. To hold that a carrier must engage in the business of carrying freight between spurs within the same terminals, or at the same station, would be to deprive it of the right to establish reasonable depots for the reception and delivery of freight, and of the right to restrict its carriage of freight between reasonable points established by it.

We might further elaborate this point by illustration and by pointing out the lack of necessity for, and the unreasonableness of, a rule that requires a carrier to engage in the transfer business of hauling freight between a freight depot and team tracks and spurs at the same station; but we believe that, on considering this question, the court will recognize the manifest injustice of such a requirement,—which requirement, we submit, is unprecedented,—and will therefore modify the opinion delivered in this cause in so far as said opinion is susceptible of the construction that it was the duty of the appellee, as a common carrier, independently of whatever practice it engaged in at Henderson with reference
269 to the handling of grain and milling products, to engage in the business of transporting freight originating at the Key-

stone mine to other spur tracks at the Henderson station and within the Henderson terminals. And we respectfully ask the court to hold that no such duty was incumbent upon the appellee as a common carrier.

II.

Was there an unjust discrimination, within the meaning of the Constitution and statutes, against the appellant in the handling of freight at Henderson? Or did the appellee, in handling grain and milling products at that point, obligate itself to transport all freight between spur tracks and sidings at the Henderson station or in the Henderson terminals?

Let us now consider the question of whether the service which the appellee performed for mills and elevators at Henderson was tantamount to an assumption of the duties and obligations of a common carrier with respect to transporting all freight between spurs and side tracks at the Henderson station and in the Henderson terminals. This inquiry necessarily embraces the question of an alleged discrimination against Higdon. The two questions we shall discuss together.

At the beginning it may be conceded that a railroad company, when authorized by its charter, can engage in the business
270 of intra-urban transportation of freight if it publicly professes and holds itself out as willing to engage in that business. It is true that if a carrier performs for some a special or unusual service, such as transporting between team tracks or handling, assorting, or assembling freight between bins or platforms in the station, it must perform the same service for all, under like circumstances; but this rule of law does not make a carrier a common carrier, as to such special or unusual service, in the sense that it must perform the service just as it must perform ordinary transportation service between public stations. Recognizing in the opinion the distinction between a transportation service and a switching service, the court loses sight of the fact that there is a usual and ordinary transportation service, which it is the duty of a carrier to engage in, and there is what is known as a special or unusual transportation service, with respect to which a carrier is not a common carrier but with respect to which it, nevertheless, may not discriminate. For instance, a railroad company can not make distribution of telegraph poles or telegraph material between stations for one company without performing a similar service for a competing company. And, yet, a railroad company is not compellable, as a common carrier, to distribute telegraph poles or telegraph material between stations; nor does it become a common carrier by its action in rendering the special or unusual transportation service of distributing telegraph poles and telegraph material between regular stations. There
271 are many things which a common carrier may do, in the performance of an unusual service, which it can not be compelled to do and with respect to which it is not a common carrier, but in the performance of which service it can not discriminate. In some cases it need not afford certain facilities for the receipt and

delivery of freight; but if facilities are granted to one or more for that purpose, the same facilities must, upon like terms and conditions, be granted to others engaged in a similar business. It has been held that where a corporation, a common carrier, under no legal duty to do so, voluntarily contracted to switch cars over its tracks between two or more railways, for which service it collected a certain switching charge for switching the cars, but charged no traffic rate for the freight transported or transferred in the cars, such corporation, in the performance of such service, assumed none of the obligations of a common carrier but only those of a switchman. The principle of law applicable to the right of a carrier to perform a special or unusual transportation service with respect to which the carrier would not be a common carrier, but with respect to which it would not be allowed to practice discrimination, is covered by the note to State, ex rel., Ellis v. Atlantic Coast Line Railroad, 12 L. R. A. (N. S.), 506. Accordingly, a railroad company may engage in the service—although it can not be compelled to do so—
of transporting a certain character of freight between certain switches at a particular station, either for the accommodation of shippers engaged in the handling of that character of freight
272 or in order to build up a larger out-bound or in-bound traffic of that particular kind of freight at the said station, with respect to which the railroad company would not be a common carrier. Or, in other words, it may at a particular station engage in a special or unusual transportation service, which it is under no legal obligation to engage in, such as the moving of grain and milling products between private spurs at that station, with respect to which it would not be a common carrier, and, in which event, it could not be compelled to transport coal or stone or any other commodity between such private spurs at that station. So, in the case at bar, the appellee was under no legal duty to haul freight between spurs in the terminals at Henderson; and, consequently, there could be no liability on the part of the appellee for refusing to perform the service demanded by the appellant, unless the appellee was at that time engaged in performing, under substantially the same circumstances, a similar service in transporting coal for others at Henderson. (Varble, etc., v. Bigley, 77 Ky. 698; Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728.)

In Santa Fe, Prescott & Phoenix R'y Co. v. Grant Bros. Construction Co., 108 Pac. 467, it was said:

"It is conceded that a public carrier may, under some circumstances, act as a private carrier. A common carrier may become a private carrier when 'as a matter of accommodation or special engagement he undertakes to carry something which it is not his business to carry.' Liverpool Steam Co. v. Phoenix Ins. Co., 129
U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; L., N., A. & C. R.
273 Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627. 4 Elliott on Railroads, p. 11, states the rule: 'Where there is a right to refuse to perform the services requested there is a right to contract for their performance in a different capacity from

that which rests upon a railroad company as a public or common carrier.'"

Whether the service the appellee company performed in handling grain or milling products between spurs in the Henderson terminals was an unusual service, with respect to which the appellee was not a common carrier, or whether by the performance of said service the appellee assumed the obligations of a common carrier as to that service, there still was no duty on the part of the appellee to perform the service demanded by the appellant, unless the service he demanded was substantially the same as that rendered in the handling of grain and milling products. The main theory of the opinion seems to be that there was an unjust discrimination against the appellant. In speaking of that phase of the case, this court said—

"It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike."

And, again:

"It is shown by the evidence that the appellee company in 1908, and for a number of years prior thereto, had been in the habit of transporting carloads of freight from industrial plants in
274 Henderson with spur connections to other industrial plants in Henderson with spur connections, but that it had never performed this service for the Keystone company. For example, it would haul a carload of corn from an elevator, connected with its belt or main line by a spur track, to a mill connected with its main or belt line by a spur track; but it would not haul a carload of coal from the mine to either the elevator or the mill."

After observing that, looking at the question from the standpoint of the traffic manager of the appellee company, there was doubtless sufficient reason for the discrimination, the court said:

"If it carried for every person, who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, Vol. 1, Sections 59, 90, 144. But, as the appellee company was engaged in the business of carrying coal, as well as other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obliged to carry for all persons all classes and character of freight offered to it."

Further along, the court said—

"The appellee company could not transfer between mills and factories corn, wheat and other articles and refuse to transfer under the same conditions coal."

In discussing the rate applicable to the service the court again emphasizes the alleged discrimination, in saying:

275 "Under these facts it was plainly a discrimination against Higdon to refuse to perform the service for him at the price charged to others for a like service."

And, further along in the opinion, it is said—

"The rate as published covered all service, and did not specify what character of freight it applied to or make any distinction between corn and coal. If under this rate it was obliged to or did in its course of dealing transfer wheat, corn or other produce for certain persons from one point in Henderson to another, then it was

obliged to perform this service upon the same terms and conditions for all persons demanding it, without reference to the class of freight hauled."

In concluding on this point the court again said:

"We again repeat that it can not be allowed to make any discrimination between Higdon and others similarly situated."

It would thus seem that the controlling idea of the court in reaching the conclusion that the appellant was entitled to the service was that a similar service, under substantially the same circumstances, was performed for grain dealers at Henderson, and that, therefore, the refusal to perform the service demanded by appellant was an unjust discrimination against him. The court cites, in the opinion, Sections 214 and 215 of the Constitution of Kentucky. These constitutional provisions are not, as we endeavored to point out in our original brief, applicable to the case at bar. Section 214 of
276 the Constitution provides that no railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight. Section 215 of the Constitution requires that all such companies shall receive, transport, haul, deliver, and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment. Of course if the appellee in the case at bar violated Section 215 of the Constitution in that it handled freight of a certain class at Henderson for some industries and shippers there but refused to handle the same class of freight, upon the same conditions and in the same manner, for other industries and shippers it also violated Section 214; otherwise, it did not violate Section 214. The statutory provisions against the offenses of unjust discrimination and undue or unreasonable preference or advantage are covered by Sections 817, 818 and 819, Kentucky Statutes. Let us inquire into the applicability of these provisions of the Constitution and statutes to the case at hand. Sections 2, 3, and 4 of the Act to Regulate Commerce are almost identical in their language with the statutory and constitutional provisions of this State directed against unjust discrimination and undue preference on the part of common carriers. If there is any difference, the Federal Act is stricter in its terms than the pro-
277 visions of the Constitution and Statutes of Kentucky. It has frequently been held, under the Act to Regulate Commerce, that not all preferences given by an interstate carrier fall within the inhibition of the provision against undue preference, but that only such preferences as are unjust and unreasonable fall within that provision.

In Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S. 263, in speaking of the provision of the Interstate Commerce Act in prohibiting undue or unreasonable preferences, the court said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable,

* * * Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

In Interstate Commerce Commission v. Alabama Midland Railway Co., 69 Fed. 227, the court said:

"It may be observed that the third section of the act does not contain the words 'under substantially similar circumstances and conditions,' and declares it to be unlawful 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, but such, only, as are undue or unreasonable."

278 In Texas & Pacific R'y Co. v. Interstate Commerce Commission, 162 U. S. 197, the Supreme Court held that the mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act to Regulate Commerce. In that opinion it was said:

"The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question."

279 The Interstate Commerce Commission—the highest expert tribunal in this country dealing with the complex problem of railway rates and their application to various commodities, in every section of the country—has held that the refusal to join in a through rate on one commodity while doing so on others was not a discrimination or preference where the commodities were not

competitive (Clark Co. v. Lake Shore, etc., R. R. Co. 11 I. C. C. R. 558); and that the allowance of a privilege to all dealers in one commodity would not necessitate the allowance of the same privilege to dealers in a noncompetitive commodity (Miner v. New York, etc., R. R. Co., 11 I. C. C. R. 422); and that no violation of Section 2 or Section 3 of the Act to Regulate Commerce was presented when no preference or discrimination between competitive articles or localities appeared (Wilson Produce Co. v. Pennsylvania R. Co., 14 I. C. C. R. 170). Again, the Interstate Commerce Commission has held that a discrimination under Section 3 to be undue must ordinarily be such that the prejudice arising out of it against one party is a source of advantage to the other. (Ky. R. R. Co. v. L. & N. R. R. Co., 10 I. C. C. Rep. 173.)

The opinion in Hoover, et al., v. Pennsylvania R. Co., 156 Pa. 229 (22 L. R. A. 262), embraces an exceedingly interesting discussion of the subject, in which it is forcibly pointed out that there can be undue preferences and unjust discriminations only where the commodities are competitive in their character and in
280 the uses for which they are intended. L. & N. R. R. Co. v. Com. of Ky., 108 Ky. 628, is in accord with that opinion.

Under the interpretation of the Interstate Commerce Act by the Interstate Commerce Commission and by the Supreme Court of the United States, it is clear that railway companies have the right to make just discriminations and give reasonable preferences in the course of their business dealings with the public.

In Interstate Commerce Commission v. B. & O. R. R. Co., supra, Mr. Justice Brown, in discussing Section 2 of the Act to Regulate Commerce, quotes, with approval, from the opinion of Judge Jackson in the court below, as follows:

"To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

This court, in L. & N. R. R. Co. v. Commonwealth, supra, held that a railroad company could lawfully make a lower rate to a milling company that used the coal for making steam power in the manufacture of flour, which was shipped over the railroad
281 company's road, than to a coal dealer who sold his coal for local consumption in domestic uses, and that the railroad company in making such a rate was not guilty of an unjust or unreasonable discrimination.

Certainly the appellee company did not engage in the business of hauling between private spurs at Henderson "freight of the same class" as the freight which the appellant sought to have trans-

ported. The transportation of coal requires the use of a freight car of a class or type entirely different from that required for the transportation of grain. The appellee's refusal to haul coal between spur tracks at Henderson applied to all coal dealers. Nor did the appellee engage in the handling of any commodity between spurs at Henderson, except grain and milling products. And, manifestly, the conditions under which it handled grain and milling products were entirely different from the conditions under which the appellant demanded that it handle coal. It not only did not handle "freight of the same class" as coal, but it did not give any undue or unreasonable preference to grain or milling products or "any particular description of traffic, in any respect whatsoever, in the transportation of a like kind of traffic at Henderson." The movement of a grain at Henderson was mainly and almost exclusively a service incidental to a transportation service, or what might be strictly termed a "switching service." The manner of handling grain there was in its nature and purpose a milling-in-transit arrangement, which the courts recognize as valid and neces-
282 sary, and which a carrier may extend to a particular kind of traffic at certain stations without affording the same privilege to non-competitive commodities at those stations. (Laurel Cotton Mills v. Gulf & S. I. R. Co., 37 Southern Rep. 134.)

In Harp v. Choctaw, 118 Fed. 169, it was held that the action of a railroad company in furnishing cars to be loaded by wagon on its tracks, at a station, with coal for shipment in one direction to points within the state, while it refused to furnish cars to be so loaded for interstate shipments in the opposite direction, was not an unlawful discrimination against a shipper, where the order applied to all persons alike.

To hold—as the opinion of this court herein seems to hold—that, inasmuch as the appellee handled grain between spurs and sidings at Henderson, it was the duty of appellee, under Sections 214 and 215 of the Constitution of Kentucky (cited in the opinion), to perform the service demanded by appellant, is equivalent to holding that coal is "freight of the same class" as grain, and that the conditions under which the appellant demanded the transportation of coal were the same as the conditions under which the appellee company handled grain at Henderson. We submit that, under the law applicable to, and the evidence in, this case, neither proposition is maintainable; for, according to the authorities hereinbefore cited, neither element of similarity contemplated by the constitutional provisions referred to exists as between the handling of grain at Henderson and the service demanded by the appellant. We therefore respectfully urge that the refusal of the appellee to
283 furnish the service demanded by the appellant was not, under the law, an unjust discrimination against the appellant, and that the movement of grain at Henderson was not, under the circumstances, an undue preference for that class of traffic or for any shipper; and, furthermore, that by furnishing the grain movement at Henderson the appellee did not obligate itself to engage in the business of hauling coal between private spurs at that station.

We again revert to the decisive question in the case: Whether it was the duty of the appellee to engage in the business of hauling freight between spurs and sidings at the Henderson station or in the Henderson terminal? Or, to be specific: Whether it was the duty of the appellee, as a common carrier, to perform the service demanded by the appellee? Unless it was the duty of the appellee to furnish such service, the opinion delivered by this court on March 18, should be withdrawn and the judgment of the court below affirmed. We have already discussed this question, both from the viewpoint of what the obligations and duties of a common carrier are with respect to handling freight between spurs and side tracks at the same station, regardless of what its professions and practices with reference thereto have been; and also from the viewpoint of whether by performing an unusual or special service on a particular traffic it thereby assumes the obligations of a common carrier between those points when it would not otherwise be obliged to carry other freight between such points. But, we desire to amplify
284 the discussion of those questions in considering the suggestion of the court, in the latter part of its opinion, that the service which Higdon desired "was the same kind of service that the appellee company would have performed if a car was loaded with coal at a mine at any point on its road and then hauled to the customer to whom it was consigned." We do not subscribe to this proposition, although we recognize the fact that the service desired by the appellant was a transportation service, as distinguished from a switching service, under the rule in Dixon v. Central of Georgia Ry. Co., 35 S. E. 369. The kind of service which the appellee demanded was not the same kind of service as that which would have been performed from one station on the appellee's line of road to another station on its line of road, but was a special service. The movement which the appellant desired to effect was from one point at a station to another point at the same station, and not a movement from one station to another station. It was a movement under the jurisdiction of one agent; it was one in which the appellee, in its regular course of business could not treat as creating any mileage at all; it was just the same sort of service as a movement from one bin in a warehouse to another bin in the same warehouse. There are numerous regular stations on the line of the appellant which are established for special purposes only. There was no separate agent for the Keystone Mining Company switch; it was merely part and parcel of the Henderson terminals, presided over by the appellee's freight agent. No freight belonging to the general public was delivered or received at that switch. Appellee's pas-
285 senger trains in Louisville stop at A Street for the purpose of taking on or letting off passengers bound to or from points outside the city. Yet, those trains will not stop at A Street, to let off a passenger who takes the train at Tenth and Broadway. The appellee is not engaged in the business of transporting passengers between Tenth and Broadway and A Street. Nor do we think that this court would hold that it is the duty of the appellee to engage in that business merely because it will take on or let off passengers

bound to or from points outside the city, at either of those places. There are other points in Louisville where the appellee's passenger trains stop, to take on or let off passengers bound to or from points outside the city; but the appellee does not engage in handling passengers between those points. Likewise, passenger trains of the Illinois Central Railroad Co. in Louisville, stop at Fourteenth and Kentucky Streets, to take on and let off passengers bound to or from points outside the city; but the Illinois Central Railroad Co. does not engage in the business of transporting passengers between Fourteenth and Kentucky Streets and its Union Depot at Seventh and Water Streets. So, also, does the Southern Railway Company stop its trains at certain points in the city for the purpose of taking on and letting off passengers bound to or from points outside the city; but it does not engage in the business of carrying passengers between those points. It is upon the same principle that spurs and sidings are furnished to industrial plants at regular stations.

286 They are merely places for the convenient receipt and delivery of freight consigned to or from such stations.

It is not only the right, but it is the duty, of a railroad company to refuse to perform transportation service within terminals. The performance of such service indiscriminately would undoubtedly interfere with the performance of its regular transportation business, the use of its different classes of equipment and with its duties to the public. Just as the carrier has the right to provide—and it is its duty to provide—that it will not carry certain dangerous substances except in certain ways, and that it will have certain tracks for the delivery of freight and other tracks for the reception of freight, and that it will establish stations at regular points and require those having business with it as a carrier to transact their business with it at such points, so has it the right—and it is its duty—to provide that it will not perform transportation service between two points in a crowded yard, where the same service can be performed for the public by teams or drays and where there is no public demand or necessity for such service by the carrier. To require carriers to perform transportation service indiscriminately between spurs and sidings in all terminals would so encumber their transportation facilities and so interfere with the use of their different classes of freight cars and their regular transportation business as to constitute an unreasonable impediment to commerce of every kind.

In Central Stock Yards Co. v. Louisville & Nashville Railroad Co., 193 U. S. 568, the Central Stock Yards Co. sought to

287 compel the railroad company to receive live stock tendered to it outside the State of Kentucky for the Central Stock Yards station and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station was at the Central Stock Yards, just outside the boundary line of Louisville, on the Southern Railway Company's line. The Central Stock Yards were the live stock depot for the purpose of handling live stock to and from Louisville on the Southern Railway Company. The Louisville & Nashville Railroad Company, by a

similar arrangement, had made the Bourbon Stock Yards its live-stock depot in Louisville, and it declined to receive live stock billed to the Central Stock Yards or to deliver live stock destined to Louisville elsewhere than at the Bourbon Stock Yards. There was a physical connection between the tracks of the Louisville & Nashville Railroad Company and the Southern Railway Company at a point between the two stock yards, which was passed by the greater part of the live stock carried by the Louisville & Nashville Railroad Company. The Bourbon Stock Yards were the live-stock depot of the Louisville & Nashville Railroad Company, not by virtue of title or fee, but by virtue of a contract. It was held that it was not the duty of the Louisville & Nashville Railroad Company to accept live stock from other States for delivery at the Central Stock Yards in Louisville, although there was a physical connection between the Southern Railway Company and the Louisville & Nashville Railroad Company. In discussing this case the court discussed it
288 as if the two stock yards were side by side. They were not; but the court held that, inasmuch as they were points of delivery for cattle having Louisville as their general destination, they were both, in effect, Louisville stations; and the court treated the case as an ordinary case of stations at substantially the same point.

This controversy was again before the Supreme Court of the United States in Louisville & Nashville Railroad Co. v. Central Stock Yards, 212 U. S. 133. The court, in discussing the judgment which required the Louisville & Nashville Railroad Company to receive at its connecting point with the Southern Railway, and to switch and deliver all live stock consigned from the Central Stock Yards to any one at the Bourbon Stock Yards, said:

"There remains for consideration only the third division of the judgment, which requires the plaintiff in error to receive at the connecting point, and to switch, transport and deliver all live stock consigned from the Central Stock Yards to any one at the Bourbon Stock Yards. This also is based upon the sections of the Constitution that have been quoted. If the principle is sound, every road in Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require
289 such an acceptance from a railroad is to take its property in a very effective sense and can not be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

This language is applicable to the case at bar; it illustrates the evil effects of a rule that would require carriers to engage in transportation service between terminal spur tracks and sidings at a station.

To compel the performance of the service demanded by the Crescent Coal Company would, in effect, convert the appellee's yard and

terminal facilities, not only at Henderson but at every other point in Kentucky, into transportation yards for the benefit of private industries, preferring such industries over the shipper who has no private spur. The performance of intra-urban transportation service indiscriminately—in which service every carrier could be required to engage, if the opinion of this court stands—would undoubtedly curtail the regular transportation business and would interfere with the interests of commerce, both interstate and intrastate, of which the railroads are instrumentalities, and as aids to which they are organized. Accordingly, the establishment of such a policy would be detrimental alike to the railroads and to the public.

290 III.

If it was the duty of the appellee company to perform the service demanded, the appellant had no right to the switching rate after the appellee offered to put in a rate for the service, which rate was reasonable, and which the appellant declined to accept or use.

A correct determination of the decisive question in this case—which question we have already discussed—will, in our opinion, eliminate from the case the question of the rate applicable to the service demanded by the appellant; and we shall not discuss the latter question further than to call the court's attention to what we believe to be an important fact, which the court appears to have failed to consider in arriving at its conclusion that the switching rate was applicable to the service demanded, and which, if considered in the light of the expressions of the opinion on that subject, would seem to lead to a conclusion different from that reached in the opinion.

It is conceded that if the appellee had no "fixed or established rate that covered this service at the time it was requested," there could be no doubt of "its right to fix a reasonable rate;" also, that the "appellee company had the right to classify freight and make a reasonable difference in its charges for different kinds of freight transferred to or from one industry to another in Hender-
291 son;" and that "its authority to make this classification and to fix different rates was as extensive as its authority to classify and charge different rates for different kinds of freight transported from one point to another outside of Henderson." But, it is said, that in publishing its tariff rates for the information and use of the public, the appellee did not stipulate for different rates or make any classification; and that, "having thus established and promulgated the rate it would charge without any attempt to designate the character of freight it would transport for this charge, we do not feel authorized to interpret this rate as meaning that it would be charged for corn or flour or meal and not coal, or to limit its application to any particular article." The court at this point loses sight of the fact that, prior to the demand made by the appellant for the service in question, there had been no demand for such service at Henderson. There was no reason for a classification of rates or for the fixing of any rate for the handling of coal between

spurs at Henderson, or from the Keystone mine to other spurs in the Henderson yards. The necessity for a classification of rates as between coal and grain or milling products, and for the fixing of a rate for coal, first arose when the appellant demanded that the service be peformed for him. When that demand was made, he was informed that the appellee did not regard the tariff provision relied on as applicable to the service demanded, but that a rate would be established for such service. If it was the duty of the appellee to perform the service demanded, it undoubtedly
292 had the right to leave its tariff provision with reference to switching in Henderson intact, and to insert into its tariff a separate provision fixing a different rate from that of the switching rate on grain and milling products, for the handling of coal between spur tracks at Henderson. While it might have been the duty of the appellee, under the opinion of this court, to handle the coal at the switching rate until a new and different rate for the handling of coal had been established, still, when a new and different rate was established, then that rate would have been applicable to the service demanded by the appellant. That is exactly what the appellee offered to do; it offered to put in a rate for the handling of coal. The appellant declined to accept any rate except the rate of $2.00 a car for switching, plus $2.00 a car for car rental. Now, there was no other industry in Henderson demanding a like service. There was no other business asking for a rate, and there was no necessity for a rate, except to apply to the service demanded by the appellant. As the appellant declined to accept any rate except the rate of $2.00 plus $2.00 a car for car rental, it would have been a vain and useless thing for the appellee to have inserted into its tariff a rate covering the handling of coal from the spur of the Keystone Mine to industries in Henderson. But its offer to establish a reasonable rate for that service was equivalent to the putting in of such a rate, in so far as the appellant is concerned. Suppose the appellee, when the appellant first demanded the service, had established and
293 promulgated a rate of fifty cents a ton, or of twenty-five cents a ton, for the hauling of coal between spurs at Henderson—which different rate being just and reasonable, for the handling of coal it had authority to establish, as conceded in the opinion: The appellant would not have accepted the rate. It would not have been used, as there was no one else to use it. Would the court then say that the appellant could recover for any difference in the cost of making deliveries, to fill his contracts, other than between the time the service was first demanded and the time that the rate was established and the appellee offered to perform the service at a just and reasonable rate to be fixed therefor? Certainly not. We have in this case an actual offer to put in a rate of fifty cents,—which different rate for the handling of coal the appellee had the right to make, under its authority to classify commodities and to fix different reasonable rates for the transportation of them. He therefore, even if it was the duty of the appellee to perform the service, should be limited in his recovery to the difference in cost of making deliveries of coal, to fill his contracts, between the time the service was first

demanded and the time the appellee offered to establish a rate. The subsequent withdrawal of the offer does not affect the question, as the appellant absolutely declined to use the rate the appellee offered to establish. The appellee was certainly not bound to leave the offer open. Nor was the reason of the appellee for withdrawing the offer material, as affecting the rights of the appellant, in view of
294 the fact that he declined to accept any rate different from the rate of $4.00 a car.

We respectfully submit, that inasmuch as there was no demand for a rate for the handling of coal between spur tracks at Henderson, except the demand of the appellant, and there was no necessity for a rate for that service except to apply to the service demanded by the appellant, and in view of the fact that the appellee company offered to establish a rate for appellant for that service and appellant declined to accept or use what the appellee believed to be a reasonable rate for the service, it was not the duty of the appellee to establish a rate for the service, or to perform the service for the switching rate provided for in its tariff.

The court is respectfully asked to grant the rehearing herein prayed for, set aside or withdraw its former opinion, and affirm the judgment appealed from.

Respectfully submitted.

BENJAMIN D. WARFIELD,
Counsel for Appellee.

295 Afterwards at a Court of Appeals held as aforesaid on the 6th day of June, 1911, the following order was entered:—

CRESCENT COAL CO.
vs.
L. & N. R. R. CO.

Henderson.

The court being advised the appellant's petition for modification and extension of the opinion herein is overruled; and appellee's petition for rehearing and modification of the opinion is overruled.

296 Be it remembered, That heretofore, to-wit on the 12th day of March, 1912 the appellant, Louisville & Nashville Railroad Company, by its counsel filed in the office of the Clerk of the Court of Appeals a transcript of record together with a bill of evidence, said transcript is in words and figures following, to-wit:—

STATE OF KENTUCKY,
County of Henderson:

Henderson Circuit Court, September Term, 1911, Friday, Oct. 6, 1911.

CRESCENT COAL COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD CO., Defendant.

Transcript.

Be it remembered that on the 24th day of October 1911, the Defendant Louisville & Nashville Railroad Company filed its schedule herein for the purpse of an appeal to the Court of Appeals.
Said schedule is here copied, viz:—

Henderson Circuit Court.

CRESCENT COAL COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Schedule.

The Clerk of this Court will make a transcript of this case for the Court of Appeals, and will include therein all of the pleadings, including the amended answer of the defendant tendered September 5, 1911, and the second amended answer of the defendant tendered September 11, 1911, all of the orders and judgments herein and the bill of exceptions filed at the present term. The original of the transcript of the evidence made by the stenographer will be transmitted to the Court of Appeals with said transcript without being copied.

297

YEAMAN & YEAMAN,
Attorneys for the Defendant.

Notice of the filing of the above schedule is accepted.

CLAY & CLAY,
Attorneys for Plaintiff.

The petition mentioned in the foregoing schedule is here copied, viz:

Henderson Circuit Court.

Jo. HIGDON, Doing Business under the Name of the Crescent Coal Company, Plaintiff,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Petition.

The plaintiff Jo. Higdon states that he is a resident of the City and County of Henderson and State of Kentucky, and is engaged in the business of buying and selling coal in the City of Henderson, Ky., under the name of the Crescent Coal Co. That the defendant, the Louisville and Nashville Railroad Company is a corporation, created, organized and doing business under the laws of the State of Kentucky, is a common carrier of freight and passengers, and has a line of railroad running through the City of Henderson, Henderson County, Ky. In and around the City of Henderson, and within what are known as the switching limits of the City of Henderson,
the said defendant has constructed a large number of switches
298 and spur tracks, leading from its main line of road, to the various industrial plants of the City of Henderson, which were constructed, and are used for, the purpose of transporting and delivering freight from and to said industrial plants, and are operated by the defendant as a part of its line of railroad.

The said defendant, The Louisville & Nashville Railroad Co. has issued and promulgated its tariff of rates for switching charges in the Henderson, Ky., terminals, which went into effect March 20th, 1908, and another tariff which went into effect May 4th, 1908, by both of which the said defendant fixed and established a charge of $2.00 per car for car rental, and $2.00 per car switching charge where it furnished cars and transported same from one industrial plant to another, and since said tariffs were promulgated and for a long while prior thereto, the said defendant did, and does now transport and switch freight in car load lots, from one switch or one industry to another, within the switching limits of the City of Henderson, Ky., at the charged named in its said tariff of rates of $2.00 per car, for rental of the car, and $2.00 per car for switching the same, and has and does perform such services for other coal dealers in the City of Henderson, and particularly for the St. Bernard Mining Co., and its local representatives, and for dealers in other commodities in the City of Henderson, Ky., at said price. It also furnished cars, and switches the same from one industry to another, within switching limits, at other points in the State of Kentucky, and in other cities and places in other States along its line, where it has physical connection with industries located thereon, at rates of from $2.00 to $5.00 per car, depending on the distance, for the whole service; in no case where such charges are made, is the distance any less than the distances to the industrial plants
299 within the switching limits of the City of Henderson, Ky.

The plaintiff states that the Keystone Mining & Manufac-

turing Co., is engaged in the operation of a coal mine in and near the City of Henderson, Ky., and within the terminal or switching limits of said City; that the mine of said Company is equipped with a switch leading from its mine to the tracks of the defendant Company, and said switch is controlled and operated by the defendant Company, and is physically connected with the right of way and tracks of the defendant. All of the industrial plants hereinafter referred to are also approached by a switch or switches, controlled and operated by the defendant, and which are physically connected with the tracks and right of way of the defendant.

Now the plaintiff states that, relying upon the duty and obligation, which he alleges rested upon the defendant to furnish him cars and to switch the same, at a seasonable rate, and at the rate charged other shippers and buyers, he entered into a contract or contracts with the said Keystone Mining & Manufacturing Co., effective July 1st, 1909, by the terms of which he agreed to purchase from said company, and said company agreed to sell and deliver him, during the year beginning July 1st, 1908, twenty thousand tons of coal at an agreed price or agreed prices, to be delivered F. O. B. cars on the defendant's track or switch, at the mine of said Company; and further made a contract with said Keystone Mining & Manufacturing Co., by the terms of which the plaintiff was made sales agent, beginning July 1st, 1908, and was given the refusal of the entire output of said Keystone Mining & Manufacturing Co., over and above what was necessary for its own use in supplying its wagon trade, or retail customers, and what was necessary to fill said contract for said 20,000 tons above mentioned. The plaintiff had sold by con-
300 tract to various industrial plants in the City of Henderson, and within said switching limits and having physical connection with the defendant's road and tracks, practically the whole of said 20,000 tons of coal purchased outright, all to be delivered to said plants in car load lots, F. O. B. their respective plants and all of said industrial concerns were able and ready to take said coal as delivered at the prices agreed upon. Plaintiff states that he could have also sold in his regular trade an amount in excess of said 20,000 tons, and could and would have sold 10,000 tons or more of coal under the second contract with said Keystone Mining & Manufacturing Co., mentioned above. He states that the defendant knew of the contracts made with said Keystone Mining & Manufacturing Co., and was notified thereof, and it knew and was notified that plaintiff could not obtain said coal from said company, and could not furnish the said coal to his customers, except at very great loss, unless it, the defendant, would furnish the cars in which to load the same at said mines, and would switch the same from said mine to the various industries on its line, and with which it has physical connection, to which the plaintiff had or might sell and contract the same. After the said contract above mentioned had been made, and beginning July 1st, 1908, it commenced ordering from the defendant cars in which to have said coal loaded placed at the Keystone Mining & Manufacturing Co. plant, and agreed to pay and offered to pay, in the regular course of its dealing with the defendant, the

amount of its tariff rates for said cars and for switching same, and offered and agreed to pay it a reasonable rate for its said services. The Keystone Mining & Manufacturing Co., likewise ordered said cars placed, and notified the defendant to place the same at this plaintiff's orders. For a long while, and up to the 13th day of July, 1908, the defendant refused to furnish said cars or to per-
301 form said switching service at all. On the 13th day of July it notified the plaintiff and said Keystone Mining & Manufacturing Co., that it was ready and willing to furnish said cars and perform said service at the rate of fifty cents per ton. Now plaintiff alleges that the coal cars in use by the defendant will hold, on an average, 80,000 lbs. or 40 tons of coal per car, and at the rate of 50¢ per ton, each car furnished and switched by the defendant would have cost this plaintiff on an average of $20.00 per car, instead of $4.00 per car, the amount charged by it to other shippers and dealers, and he states that the said rate of .50¢ per ton was and is unreasonable and exorbitant. Between the 1st day of July 1908, and the 13th day of July 1908, it ordered from the defendant a large number of cars to be placed at said mine, there to be loaded with coal and switched as aforesaid, as did likewise the Keystone Mining & Manufacturing Co. on its account, but the defendant failed and refused to furnish said cars. Between the 13th day of July 1908 and the 13th day of August, 1908, the plaintiff, as well as said Keystone Mining & Manufacturing Co. for and on his account, ordered a large number of cars placed at said mine to be loaded with coal by said Mining Co. and switched as aforesaid by the defendant, but the defendant refused to furnish said cars or to perform said switching service, unless the plaintiff would agree to pay said excessive and exorbitant rate of 50¢ *cents* per ton, which he refused to pay. On the 13th day of August, 1908, the defendant notified this plaintiff, as well as said Keystone Mining & Manufacturing Co., that it would not furnish cars to be loaded with coal at the mine of said Keystone Mining & Manufacturing Co. for switching to plants on its road within the switching limits, and would not switch the same when loaded from said Keystone Mining & Manufacturing Co. to plants on its road within the switching limits, at all or at any
302 price. Said notice was given in the form of a letter from the defendant through its agent R. W. Powell, and the one received by this plaintiff is filed herewith as part hereof marked A.

By the refusal of the defendant to furnish said cars at the plant of the Keystone Mining & Manufacturing Co., and by its refusal to switch the same from there to various industrial plants in the City of Henderson, on its line, with which it had physical connection, and with which the plaintiff was doing business, the defendant has rendered this plaintiff's contracts with the said Keystone Mining & Manufacturing Co., and each of them, a nudum pactum, and has made it impossible for this plaintiff to obtain the coal necessary to be handled by him to fill his contracts and to carry on his business, except at greatly increased prices. He states that if the defendant had furnished said cars, and switched the same as above stated, he could and would have paid the same, and offered to pay the same,

and could and would have paid to said Keystone Mining & Manufacturing Co. the contract price for said coal, and he could and would have sold, and actually had sold or arranged to sell, at least 30,000 tons of coal per year, at a price which would have netted to this plaintiff a profit of forty cents per ton after payment of original cost price, freight and all expenses, the whole of which he has lost by reason of the refusal of the defendant to perform said service as aforesaid. The plaintiff states that, to obtain the coal necessary for him to use in filling his contracts, and to carry on his business, he would have to pay therefor, delivered in Henderson, a much larger price than that agreed to be paid to said Keystone Mining & Manufacturing Co., and the difference in price plus the freight from other points, would be in excess of the profit he would or could
303 make on same; and if plaintiff is compelled to go on the open market and obtain said coal elsewhere, instead of making a profit thereon, he would have to deliver same to his customers at a loss.

The plaintiff states that the contracts aforesaid, made with the Keystone Mining & Manufacturing Co., run from the 1st day of July, 1908, to the 1st day of July, 1909, with the privilege given this plaintiff to renew the same for another year on the same terms. He states that his profits under said contracts, and on said coal for the first year would have amounted to the sum of $12,000.00, and for the second year to the sum of $12,000.00, over and above cost, freight, and expenses, for each year.

The plaintiff further states that the rate of $4.00 per car, contained in defendant's tariff of rates, that is to say, $2.00 per car for rental of the car, and $2.00 per car for switching same, while higher than the rate charged by the defendant at other places and under similar conditions, is a reasonable rate, all things considered, and the plaintiff was ready and willing and is now ready and willing, to pay the same. The action of the defendant in refusing to furnish cars and handle said coal at all, is high handed and arbitrary, and is an unjust discrimination against this plaintiff, against the locality in which he does business, and is against the commodity and description of freight in which he deals, and gives to other persons, localities, and descriptions of traffic an undue and -reasonable preference or advantage.

Plaintiff states that by reason of the action of the defendant, as herein set forth, he has been damaged in the sum of twenty-four thousand ($24,000.00) dollars, and is also entitled to recover of the defendant reasonable attorneys' fees herein.

304 Wherefore the plaintiff prays judgment against the defendant for the sum of Twenty-four thousand ($24,000.00) dollars, damages; he prays judgment for reasonable attorneys' fees to be fixed by the court, and he prays for his costs herein and for all proper relief.

CLAY & CLAY,
Attorneys for Plaintiff.

On Sept. 8, 1908 being the 2nd. day of the September 1908 Term of Court, the defendant filed a special demurrer to the jurisdiction of this Court herein. Said demurrer is here copied, Viz:—

Henderson Circuit Court.

Jo. Higdon, &c., Plaintiff,
vs.
Louisville & Nashville Railroad Co., Defendant.

Demurrer.

Defendant demurs specially to the petition of plaintiff herein because this court has no jurisdiction of the subject of the action.

YEAMAN & YEAMAN,
Att'ys for Defendant.

On October 6th being the 26th day of the September 1911 Term of the Court, the following order was entered herein, Viz:—

Coming on to be heard *on* the defendant's special demurrer heretofore filed herein, *and* the Court being advised overrules the same, to which ruling of the Court the defendant objects and excepts. Thereupon the defendant by attorney filed a general demurrer to plaintiff's petition.

305 The General Demurrer mentioned above and filed on Oct. 6th. 1908 is here copied, Viz:—

Henderson Circuit Court.

Crescent Coal Co., Plaintiff.
vs.
Louisville & Nashville Railroad Co., Defendant.

General Demurrer.

The defendant demurs generally to plaintiff's petition because it does not state facts sufficient to constitute any cause of action against this defendant and hereof it prays the judgment of this court.

LOUISVILLE & NASHVILLE R. R. CO.,
By YEAMAN & YEAMAN, *Att'ys.*

On Jan'y 4th being the 1st day of the January 1909 Term of Court the following order was entered herein, Viz:—

Ordered that the above styled case be set for trial on the 33rd. day of the term.

On May 3rd being the 1st day of the May 1909 Term of Court the following order was entered herein, Viz:—

Ordered that this case be set for trial on the 17th. day of the term.

On September 8th. being the 3rd. day of the September 1909 Term of Court the following order was entered herein, Viz:—

It is ordered by the Court that this case be and it is set for trial on the 35th day of the present term of Court.

306 On September 27th. being the 19th day of the September 1909 Term of Court the following order was entered herein, Viz:—

Came defendant by attorney and moved the Court to rule the plaintiff to file tariff referred to in plaintiff's petition as having been promulgated March 20, 1908 and one promulgated May 4th. 1908. The court being advised overrules said motion to which ruling of court the defendant objects and excepts.

On October 7th. being the 28th. day of the September 1909 Term of Court the following order was entered herein, Viz:

Coming on to be heard *on* defendant's demurrer to plaintiff's petition *and* the court being advised overrules same to which ruling of the court the defendant excepts and objects.

On October 11, 1909 being the 31st. day of the September 1909 Term of Court, the Defendant filed its answer herein. Said answer is here copied, Viz:

Henderson Circuit Court.

Jo Higdon, Doing Business under the Name of Crescent Coal Company, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Answer.

The defendant, the Louisville & Nashville Railroad Company, for its answer to the plaintiff's petition, denies that any of the switches or spur tracks in the City of Henderson leading from its main line of road to the various industrial plants, or any of the industrial plants of said city, were constructed by the defendant, except under contract with and for said industrial plants' own use and control, and it says that they have always owned and controlled said switches

307 and spur tracks, and it denies that any of said switches or spur tracks, are operated by the defendant as a part of its line of railroad.

The defendant denies that it has issued or promulgated any tariff of rates for switching charges in the Henderson Kentucky terminals, or that any such tariff went into effect March 20, 1908, or May 4th. 1908 or at any time, or that by any such tariff; or any tariff it fixed or established a charge of $2.00 or any sum per car for car rental, or any sum per car for switching charge, or that it has fixed or published or promulgated any tariff or schedule, or rate of charges for car rental or *car rental* for switching or transporting cars or freight from one industrial plant to another within the City of Henderson, except as hereinafter stated, and set forth in this answer.

It denies that since March 20, 1908, or May 4, 1908, or at all, it has or does, except as hereinafter stated, transport or switch freight from one switch or one industry to another within the limits of the City of Henderson at a charge of $2, or any sum per car for car rental, or $2, or any sum for switching, or that it has or does perform such service for other, or any coal dealers in the City of Henderson, or for dealers in other commodities in said City, or at other points in the State of Kentucky, or in other cities or, places in other States along its line.

The defendant denies that any switch leading from the Keystone Mining & Manufacturing Company's mine or property to the tracks of the defendant is or has been controlled or operated by the defendant, or that the defendant controls, or operates the switch of any industrial plant in the City of Henderson.

Defendant denies that it is or was under a duty or obligation to switch or transport the coal or other property of the plaintiff or of the Keystone Mining & Manufacturing Company, or other
308 person from one switch or point within the City of Henderson to another point or switch within said City, or to furnish cars with which to do such switching, and it denies that the plaintiff in reliance upon any such duty or obligation entered into any contract with the Keystone Mining & Manufacturing Company, or other person, to purchase from said Company 20,000 tons, or any quantity of coal to be delivered on defendant's track or elsewhere, or that the plaintiff was given the refusal of the entire or any of the output of said Keystone Mining & Manufacturing Company in excess of said 20,000 tons and what was necessary to supply its own wagon trade or otherwise. Defendant denies that the plaintiff had sold the whole or any part of said 20,000 tons of coal to industrial plants in the City of Henderson having physical connection with this defendant's road or tracks, and it has no knowledge or information sufficient to form a belief that said industrial concerns, or any of them were ready to take said coal, or any part thereof as delivered to them, nor that the plaintiff could have sold in his regular trade, or otherwise any amount in excess of said 20,000 tons, nor that he could or would have sold 10,000 tons, or any quantity of coal under any contract with said Keystone Mining & Manufacturing Company. Defendant denies that it knew of any contract made by plaintiff with said Keystone Mining & Manufacturing Company, or that it was notified thereof, or that it knew, or was notified that the plaintiff could not obtain said coal from said Company, or that it could not furnish said coal to his customers, except that the defendant would furnish cars in which to load said coal at the mines of the Keystone Mining & Manufacturing Company and switch same when loaded, to the said industries in the City of Henderson. It denies that beginning with July 1st., 1908, or at any other time, the plaintiff
309 has ever agreed or offered to pay defendant the amount of 1st tariff rates, for said cars or any of them, or for switching same. It denies that it charges, or ever has charged shippers, other than the plaintiff $4.00 per car or any sum for switching coal from one industrial plant within the City of Henderson to another such

plant within said City, or that it does or has engaged in such switching. It denies that between July 1st. 1908 and July 13, 1908, or between July 13, 1908 and August 13, 1908, or at any time plaintiff ordered a large number of cars to be placed at said mine to be loaded with coal and switched. Defendant denies that its refusal to furnish cars to be loaded at said Mining Company's mine, or its refusal to switch the same from there to the other industrial plants within the City of Henderson, has made it impossible for the plaintiff to obtain coal necessary to fill any contract, or to carry on his business, or has in any manner made any contract of his void, or in any manner affected any contract.

Defendant has no knowledge or information sufficient to form a belief that if it had furnished cars on the switch of said Keystone Mining & Manufacturing Company and had switched said cars when loaded, the plaintiff could or would have paid said Company the contract price for said coal, nor that he could or would have sold, nor that he had sold or arranged to sell 30,000 tons, or any quantity of coal per year at a price that would have netted him a profit of forty cents, or any sum per ton, and it denies that he has lost any profit by reason of the refusal of defendant to furnish cars on the switch of said Keystone Mining & Manufacturing Company, or to switch the same to other points within the City of Henderson, nor by any act of defendant. It has no knowledge or information sufficient to form a belief that the plaintiff in order to obtain the coal
310 necessary for him to fill any contract he had made, or to carry on his business would have to pay a larger price than that agreed to be paid to said Keystone Mining & Manufacturing Company, nor that the difference in price, with freight added from other points, would be in excess of the profit he could or would make on same, nor that he would have to deliver same to customers at a loss.

The defendant has no knowledge or information sufficient to form a belief that the plaintiff made or had any contract with the Keystone Mining & Manufacturing Company for the purchase of any coal, nor that any such contract run from July 1, 1908 to July 1st 1909, nor that the plaintiff had the privilege to renew any contract for another year on the same, or any terms, nor that his profits under any contract for the first year, or second, or any year, would have been $12,000, or any sum, and it denies that any act of it was either high-handed or arbitrary, or was an unjust discrimination, or any discrimination against plaintiff, or against the locality in which he does business, or against any commodity in which he deals, or gave to any other person, locality or description of traffic any preference or advantage, and it denies that the plaintiff has been damaged in any sum by any act of this defendant.

II.

The defendant admits that it is a railroad corporation, and is a common carrier of freight and passengers, that it is engaged in the business of operating a railroad between Henderson, Kentucky, and many other points within and without the State of Kentucky, but it says that it does not and never has engaged in the transporta-

tion of freight or passengers, except as between stopping places or stations on its line of railroad, and it has never engaged in the business of, nor has it ever held itself out as engaged in the business of furnishing cars to be switched from one point within the
311 City of Henderson, Kentucky, to any other point within said City, nor from one point within any City or stopping place, or station to any other point within the same stopping place or station, and it alleges and submits that its business and duty as such common carrier does not require, and would not permit of its engaging in such intraurban business. The defendant says that in order that it might be understood by all persons having business with it in the said City of Henderson and by the public generally of said City, that it did not engage in furnishing cars to be switched, nor in switching cars between different points within the same City or station, it had printed and published its rates, rules and regulations governing the switching of cars, wherein it was plainly and distinctly set forth and stated as follows:

"The L. & N. R. R. Co., does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Ky., Terminals, but where any such service is performed as an accommodation a charge of $2 per car plus $2 for car rental shall be assessed."

which statement was so printed and published long before the time that the plaintiff claims to have made any contract with the Keystone Mining & Manufacturing Company, and long before he had made any contract with said Company, and it avers that at the time he made the alleged contract with said Company, (if any such contract was ever made, which defendant does not admit) he was informed of, and had full notice and knowledge of the said rule and regulation above copied and set forth.

Defendant prays to be dismissed with its costs and for all proper relief.

YEAMAN & YEAMAN,
Attorneys for Defendant.

On October 15th being the 35th day of the September 1911 Term of Court the following order was entered herein, viz:
312 Ordered that the plaintiff be and is given until the Nov Rule Day in which to file its reply and the case is continued generally to the January term next.

On October 28th 1909 being the 46th day of the September 1909 Term of Court the following order was entered herein, viz:

Came the defendant by attorney and moves the Court to transfer this case to the Equity side of the docket, — orders that the said motion be and is continued for the present.

On October 29th 1909 being the 47th day of the September 1909 Term of Court the following order was entered herein, viz:

Coming on to be heard on defendant's motion to transfer this

cause to the Equity side of the docket and the court considering same, orders the cause transferred and docketed in Equity which is now done. To this ruling of the Court the plaintiff objects and excepts.

On February 22nd being the 44th day of the January 1910 Term of Court the following order was entered herein, viz:
By agreement of parties, it is ordered that this case be continued.

On May 3rd being the 2nd day of the May 1910 Term of Court the following order was entered herein, viz:
By agreement of parties, it is ordered that the defendant be given leave to retake the deposition of R. W. Powell.

On October 14th 1910 being the 35th day of the September 1910 Term of Court the following order was entered herein, viz:
On motion of plaintiff by attorney this case is submitted to the Court for trial.

313 On October 22 being the 42 day of the September 1910 Term of Court the following order was entered herein, viz:
By agreement of parties, all affirmative allegations in defendant's answer herein are taken as controverted of record.

On October 27th, being 46th day of the October 1910 Term of Court the following order was entered herein, viz:
This cause coming on to be heard upon the whole record, and the Court having heard the Argument, and being sufficiently advised, it is now ordered and adjudged that the plaintiff Jo. Higdon recover nothing, that his petition be and it is dismissed absolutely, and that the defendant, the Louisville & Nashville Railroad Company recover of Jo. Higdon, doing business as and in the name of the Crescent Coal Company, its costs herein expended, for which execution may issue. The plaintiff objects and excepts to the whole of this judgment, and prays an appeal to the Court of Appeals, which is granted. Then came plaintiff and tendered its Bill of exceptions, and moved the Court to sign and file same, and make it a part of the record, which is done, and said Bill of exceptions, is now signed and filed and made a part of the record.

On October 28th 1910 being the 47th day of the September 1910 Term of Court, the following order was entered herein, viz:
Came the plaintiff and filed its schedule and agreement. It appearing from said agreement that the parties have agreed thereto, it is ordered by the Court that the Clerk attach to the record for the Court of Appeals, the original Terminal Tariff of the Louisville & Nashville Railroad Co. being exhibit No. 10 filed with the deposition of Jos. Higdon, and the original statement of Switching done, filed with the 2nd deposition of R. W. Powell, without copying
314 same into the record, and without being copied in the case,

On Feb. 11th 1911 being the 36th day of the January 1911 Term of Court the following order was entered herein, viz:

It is ordered by the Court that this case be continued to await the decision of the Court of Appeals.

On September 5th. 1911 being the 2nd day of the September 1911 Term of Court the following order was entered herein, viz:

Came the plaintiff by attorney and filed the mandate of the Court of Appeals reversing the above case, and on his motion this case is now transferred to, and placed upon, the ordinary docket for trial. The mandate is in words and figures as follows:

THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CRESCENT COAL COMPANY, Appellant,
against
LOUISVILLE & NASHVILLE R. R. Co., Appellee.

Appeal from a Judgment of the Henderson Circuit Court.

MARCH 18, 1911.

The Court being sufficiently advised, it seems to them the judgment herein is erroneous. It is therefore considered that said judgment be reversed, and cause remanded for a new trial in conformity with the opinion. Which is ordered to be certified to said Court.

NAPIER ADAMS, *C. C. A.*,
By C. S. WILSON, *D. C.*

A Copy Attest:
Issued June 6th, 1911.

Came the defendant, by attorney, and tendered and moved to file an amended answer herein. Said motion is continued for the present.

On September 7th 1911 being the 4th day of the Septem-
315 ber 1911 Term of Court the following order was entered herein, viz:

It is ordered that this case be set for trial on the 27th day of present term of Court.

On September 11th 1911 being the 7th day of the September 1911 Term of Court the following order was entered herein, viz:

Came the defendant by attorney and tendered and moved the Court to file a second amended answer herein. Said motion is continued for the present.

On September 19th 1911 being the 14th day of the September 1911 Term of the Court the following order was entered herein, viz:

The motion heretofore made on September 5th 1911 by the defendant to file the amended answer then tendered, and the motion made on September 11, 1911 by the defendant to file the second amended answer then tendered, now both coming on to be heard and the Court being sufficiently advised as to both motions, both motions are overruled, and said amended answer and said second amended answer are both rejected, to all of which the defendant objects and excepts. The said amended answer is endorsed "1911 Sep'r 5 Tendered Attest W. G. Moseley, Clerk, By T. D. Alves, D. C." and said second amended answer is endorsed "1911 Sept. 11, Tendered Attest T. D. Alves, Clerk," and they are both now so identified and are made parts of the record of this case, and will be made parts of any transcript of the record in this case.

The Amended Answer referred to above is here copied, viz:

Henderson Circuit Court.

CRESCENT COAL COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Amended Answer.

316 The defendant, the Louisville & Nashville Railroad Company, by leave of Court amends its answer herein, and, as an amendment thereto and a second paragraph thereof, says that it is now, and was at all the times complained of in the petition, a common carrier, engaged in the business of carrying passengers and freight for hire, between regular stations on its line of road in Kentucky and elsewhere; that one of said stations to and from which it carries passengers and freight as aforesaid is Henderson, Kentucky, and that at said station, and within the City of Henderson it had at the times complained of in the petition built and constructed side tracks and spurs from its main line to certain industries and factories in Henderson, for the convenience of the owners and operators of said industries and factories in making delivery to them on said spurs and sidings, of freight coming into Henderson from points and stations on defendant's line outside of Henderson, and for the convenience of the said operators and owners of said factories in delivering to this defendant on said spurs and sidings, freight consigned to points and stations on defendant's line outside of Henderson; that the Keystone Mining & Manufacturing Company, at the times complained of in the petition owned, and now owns, a mine within the City of Henderson, at the said Henderson station, and within the territory served by said station; that it was from said mine that the plaintiff alleges he purchased the coal referred to in the petition. And the defendant says that about the time said mine was opened, it, at the request of the said Keystone Mining & Manufacturing Company built and constructed for said company a spur track from the main line of this defendant's road to the shaft of the

said company's mine, with the express understanding that this defendant would not transport for the Keystone Mining &
317 Manufacturing Company or any one else coal between said spur and other spurs and sidings at the Henderson station, but that said spur should be used solely as a receiving and delivery track at said mine, for freight coming into and going out of Henderson. The defendant says that it does not now engage, and has never engaged, in the business of transporting freight as a common carrier, in carload lots or otherwise, between industries or mines or spurs at Henderson or at any station on its line of road, and that it does not now profess, and has never professed, to engage in such business at Henderson, Kentucky, or any other point on its line of road. Defendant says that at none of the times complained of in the petition was it engaged in or did it profess to engage in the business of transporting coal from the mine of the Keystone Mining & Manufacturing Company to other industries at the Henderson station, or between the spur track of said mine and other spur tracks at said station. The defendant says that it did perform at Henderson, and at the times complained of, a switching service, but that such service was only performed where it preceded or followed the transportation of freight from or to the Henderson yards or terminals. The defendant says that the service which the plaintiff requested this defendant to perform at Henderson was that of transporting coal from the Keystone Mine to the Henderson Elevator Company and other industries in Henderson and at the Henderson station, and that such service was a transportation service, and that the defendant declined to perform said service because it did not at that time engage, and had never engaged, as a common carrier or otherwise, in the business of transporting coal between spurs at Henderson, or from the mine of the Keystone Mining & Manufacturing Company to industries at the Henderson station, and that it did not at that time profess, and had never professed, to
318 engage in that business; and it was not its duty, as a common carrier, to engage in such business, or to transport coal from the mine of the Keystone Mining & Manufacturing Company to industries or sidings at the Henderson Station or in the City of Henderson. The defendant says that by neither of the tariffs referred to in the petition did it fix or establish a rate for the movement of coal from the mine of the Keystone Mining & Manufacturing Company to spur tracks or industries at Henderson, nor did it by either of said tariffs offer to haul coal from the said mine to industries in Henderson, or hold itself out as willing to engage in such service. The defendant says that there was not, at any of the times complained of in the petition, any demand for the service which the plaintiff demanded that the defendant perform for him, except the demand made by the plaintiff; that there is, and was at the times complained of, no other coal mine in Henderson, and that this defendant did not at any of the times complained of perform the service of transporting coal between spurs or sidings at said Henderson station, and did not at any of said times engage, as a common carrier, in the business of transporting freight between

spurs and sidings at the said Henderson station. The defendant says that it was not its duty, under the law, to furnish cars to be used for transporting coal from the mine of the Keystone Mining & Manufacturing Company to industries in Henderson or to perform the service demanded by the plaintiff, or to transport coal from the mine of the Keystone Mining & Manufacturing Company to the Henderson Elevator Company or any other industry in Henderson, and that it did not engage in such service, and did not profess to engage therein, and it says that it was its duty to transport coal from said mine to industries in Henderson or to furnish freight cars for that purpose, at four (4) dollars a car, as alleged in
319 the petition, or for any other sum, but that it was the defendant's duty to perform the service and it had undertaken to perform said service, a reasonable charge for transporting coal, and furnishing cars for that purpose, from the said mine to industries in Henderson would have been fifty cents a ton; that a rate of fifty cents a ton for transporting coal from other points near Henderson to Henderson was the legal rate in effect at all times complained of in the petition, and was a reasonable rate, and that a like rate would have been a reasonable rate for the performance of the service for the plaintiff, in transporting coal from the mine of the Keystone Mining & Manufacturing Company to industries and factories at Henderson, and that a rate of four (4) dollars a car, or a smaller rate than fifty cents a ton, would not have been adequate compensation for the service of moving the coal from the mine of the Keystone Mining & Manufacturing Company to industries at Henderson; and that compel the defendant to perform the service at all, or to perform said service at four (4) dollars a car, or for a rate less than fifty cents a ton, would be to compel the defendant to perform a service that, under the law, it is not the duty of the defendant to perform, and would be to compel the defendant to perform such service at less than the cost thereof, or for less than the service is worth, which would deprive the defendant of its property without due process of law, and would deny to it the equal protection of the law, contrary to Article 14 of the Amendments to the Constitution of the United States, and the defendant pleads and relies on said Article 14 of the Amendments to tht Constitution of the United States, as a defense to the claims of the plaintiff herein.

Defendant prays as in its original answer, and for all proper relief.

YEAMAN & YEAMAN,
Attorneys for Defendant.

320 The Second Amended Answer referred to heretofore and Tendered on Sept. 11, 1911, is here copied, viz:

Henderson Circuit Court.

CRESCENT COAL COMPANY, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Second Amended Answer.

The defendant, the Louisville & Nashville Railroad Company, by leave of Court, amends its answer herein, and for amendment thereto, says that the spur or side track on which the plaintiff requested the defendant to place cars to be used for loading coal at the Keystone Mine, and from which the plaintiff demanded that the defendant haul coal to spurs and side tracks in Henderson, was built by this defendant for the Keystone Mining & Manufacturing Company, to be used by that company as a convenient place for the delivery of freight consigned to said Keystone Mining & Manufacturing Company from points outside the City of Henderson, and from stations on the defendant's line of railroad other than the Henderson station, and for convenient reception of coal from the Keystone Mine for shipment from said mine to points outside of Henderson and regular stations on defendant's line other than Henderson; that said spur or side track was not constructed or intended to be used for the purpose of receiving freight thereon to be transported to other spurs or side tracks in the City of Henderson. Defendant says that the said spur track was at the time complained of, and is now, within the territory served by the regular freight station and passenger station which this defendant established at Henderson, and which it maintained there during all the times complained of, and which is now maintains there, and that said spur was at all of the times, and is now, within the switching limits of the defendant's terminals and yards at Henderson; that
321 the service demanded by the plaintiff at the time complained of was the service of hauling coal from the said spur track of the Keystone Mining & Manufacturing Company to other spurs and sidings in the City of Henderson, and that the performance of such a service at Henderson would impose upon the defendant the duty of performing the service of transporting freight between all spurs and sidings at all stations on the road of the defendant in Kentucky. The defendant says that it was not at the time complained of, and has never, engaged in the business of transporting freight as a common carrier, or otherwise, between private spurs and sidings; that it did not at the time complained of profess, and has never professed, to engage in that business as a common carrier, or otherwise; that it was its duty under the law, as a common carrier, to engage in the business of transporting passengers, and freight between regular stations on its line of road, but that it was not its duty as a common carrier or otherwise, to perform the service demanded by the plaintiff; that it is engaged in the business of interstate transportation and is a carrier of Interstate commerce, and

it avers that its facilities at Henderson for making deliveries of freight consigned to that point, and receiving freight shipped therefrom, were during all the times complained of, and are now, amply sufficient to accommodate the public; but it avers that it was not its duty as a common carrier, or otherwise, at the time complained of, to furnish cars to be used in the handling of freight between side tracks or spurs in the city of Henderson, or to haul freight between such tracks and spurs of said station, which was the service demanded by the plaintiff. The defendant further avers that to require the defendant to perform the service for the plaintiff would impose upon the defendant the duty of performing a like service for other shippers at Henderson and a like service at other
322 points on the line of defendant's road in Kentucky, and would impose upon the defendant an unreasonable, unjustifiable, and unwarrantable duty, which it, as a common carrier, is not required to perform, and would be a direct and unreasonable and unwarrantable interference with its interstate business and its duties as a carrier of interstate commerce. And it avers that such a requirement would be void and not binding on the defendants, and would impose an unreasonable burden on interstate commerce, contrary to Subsection 3, Section 8, Article 1, of the Constitution of the United States.

Wherefore, having fully answered, defendant prays to be hence dismissed, with judgment for its costs, and for all proper relief.

YEAMAN & YEAMAN,
Attorneys for Defendant.

On October 4th, 1911, being the 27th day of the September, 1911, Term of Court the following order was entered herein, viz:

Parties appeared by Attorney. The plaintiff announced ready for trial and the defendant announced not ready on account of absence of a material witness, and moved the Court for a continuance and filed an affidavit in support of said motion. The Plaintiff objected to a continuance on the grounds that due diligence was not shown by Defendant and the Court being advised adjudged that said affidavit was sufficient, to which ruling of Court the Plaintiff objected and excepted. It was thereupon consented by the plaintiff that said affidavit might be read in evidence as the deposition of the witness.

On October 5th, 1911, being the 28th day of the September, 1911, Term of Court the following order was entered herein, viz:

323 Parties appeared by attorney, announcing ready for trial came the following Jurors, To-wit: Cliff Moss, Emmitt Farley, A. R. Elam, E. G. Abbott, Sam Connell, J. T. Jennings, J. R. Stolzy, T. W. Buckner, H. F. W. Schuette, E. L. Otey, D. F. Gooch and Oscar McMullin, all of whom were sworn according to law and the trial of the case proceeded with. On motion of the defendant and by agreement Miss Augusta Fitz Gibbon, Official Stenographer of this Court appeared and proceeded to take a stenographic report of the evidence herein. At 12 o'clock not having

time to complete the trial of the case, the Jury was admonished by Court as by law required, allowed to disperse and directed to be in Court at 1 o'clock, to which time this case is continued. At 1 o'clock parties appeared by Attorney, the Jury heretofore empaneled appeared, were called and the trial of the case proceeded with. At 4:15 o'clock not having time to complete the trial of the case, the Jury was admonished by Court as by law required, allowed to disperse and directed to be in Court tomorrow morning at nine o'clock, to which time this case was continued.

On October 6, 1911, being the 29th day of the September, 1911, Term of Court the following order was entered herein, viz: Parties appeared by Attorney, the Jury heretofore empaneled appeared, were called and the trial of the case proceeded with. At 12 o'clock not having time to complete the trial of the case, the Jury was admonished by Court as by law required, allowed to disperse, and directed to be in Court at 2 o'clock to which time this case was continued. At 2 o'clock parties appeared, were called and the trial of the case proceeded with. Having heard the evidence, received the instructions of Court and heard the arguments of Counsel, the

324 jury retired to their room and presently returned into Court the following verdict, viz: We the Jury find for the plaintiff in the sum of $3037.10. T. W. Buckner, Foreman. Therefore it is adjudged by Court that the Plaintiff, the Crescent Coal Co., recover of the defendant, the Louisville & Nashville Railroad Company, the sum of $3037.10, with interest thereon at 6% per annum from this time until paid, and its costs herein expended for all of which execution may issue.

On October 7th, 1911, being the 30th day of the September, 1911, Term of Court the following order was entered herein, viz:

Came the defendant by Attorney and tendered and moved the Court to file a written motion and reasons for a new trial. Which motion for the present is continued.

On October 11th being the 33rd day of the September, 1911, Term of Court the following order was entered herein, viz:

This cause coming on to be heard on the Defendant's motion and reasons for a new trial and the Court being advised overrules said motion, to which ruling of the Court the defendant objects and excepts and prays an appeal to the Court of Appeals, which is granted, and the defendant is given to and including the 45th day of the present term of Court to file a Bill of Exceptions.

On October 11th, 1911, being the 33rd day of the September, 1911, Term of Court the following order was entered herein, viz:

Came Miss Augusta Fitz Gibbon, Official Stenographer and filed her account herein against the Louisville & Nashville Railroad Company, for Ten Dollars, which is now allowed and ordered paid and taxed as cost.

325 On October 16th, 1911 being the 37th day of the September 1911 Term of Court the following order was entered herein, viz:—

It appearing that the original statement of switching done by the defendant, being a tabulated statement on eight sheets of paper

has been returned to this Court from the Court of Appeals and was used in evidence on the trial of this case at the present term; now by agreement of the parties, plaintiff and defendant, it is ordered that the original of said statement be attached to and made a part of the stenographer's transcript of the evidence in this case without copying the same.

On October 21st, 1911 being the 42 day of the September 1911 Term of Court the following order was entered herein, viz:—

Appeared the defendant, the Louisville & Nashville Railroad Co., and tendered a bill of exceptions herein and moved the Court to sign the same and to file it and make it a part of the record of this case and also tendered the stenographer's transcript of the evidence heard on the trial of this case together with a carbon copy of said Transcript, and moved the Court to certify said transcript and copy and to file the same and make them parts of the record of this case which motions are, at the request of the plaintiff, continued for the present.

On October 24th, 1911 being the 44 day of the September 1911 Term of Court the following order was entered herein, viz:—

The Bill of Exceptions, Transcript of the evidence and Carbon Copy of same, heretofore tendered herein having been considered by the Court are now signed and certified to by the Judge of this Court as being correct, and are ordered filed and made a part of the record herein. Then the defendant appeared and tendered
326 its schedule for the purpose of an appeal to the Court of Appeals, and the notice of filing of said Schedule having been duly accepted by the Plaintiff the same is now ordered filed.

The Bill of Exceptions referred to above are here, copied, viz:—

Henderson Circuit Court.

Jo. Higdon, Doing Business in the Name of Crescent Coal Company, Plaintiff,

vs.

Louisville & Nashville Railroad Company, Defendant.

Bill of Exceptions.

Be it remembered: That during the hearing of the evidence on the trial of this case the defendant objected to the introduction of certain evidence by the plaintiff, and objected to certain questions put by plaintiff to the witnesses, which objections were overruled by the Court, to which rulings the defendant at the time objected and excepted, and still excepts, and the defendant offered to introduce certain evidence, and put certain questions to witnesses to which the plaintiff objected, and said objections were sustained and said evidence excluded, to which rulings the defendant at the time objected and excepted, and still excepts, all which rulings and objections and exceptions are stated and set forth in the stenographer's transcript of the evidence, which transcript is made part of this bill of exceptions, and is filed herewith as a part hereof and for identification is marked X.

At the conclusion of all the evidence the Court of its own motion proposed and offered to give to the jury certain instructions as follows:—

"1. Gentlemen of the Jury the Court instructs you that if you shall believe from the evidence that the plaintiff on May 14,
327 1908 completed and entered into a contract with the Keystone Mining & Manufacturing Company, as read to you in evidence, for the purchase of, not exceeding, 20,000 tons of coal in car load lots to be furnished for the year beginning July 1, 1908 and ending July 1, 1909 to be delivered f. o. b. cars on defendant's railroad switch, at its mine, and shall believe further from the evidence that the plaintiff, either before or after July 1, 1908 sold or contracted to sell said coal, or any part thereof, to be delivered during said period in car load lots at industries within the terminal or switching limits of the City of Henderson having switch or spur connection with the defendant's tracks and requested the defendant to furnish the cars in which to load and transport said coal or such part thereof as was sold, or which he contracted to sell, then in that event it was the legal duty of the defendant to furnish said cars and transport said coal at its tariff rate of $2.00 per car for rental of the car and $2.00 per car for switching same from said mine to such industries, and upon its failure or refusal to do so, the plaintiff had the right to procure elsewhere the coal to fill his said contracts and orders, if any, and to recover of the defendant the difference between what it reasonably cost him to fill the contracts and agreements made with or orders received from such industries having spur connection, as aforesaid, from other sources, during said period, and what it would have cost him if he had obtained said coal from the Keystone Mining & Manufacturing Company under its said contract during said time. If, therefore, you shall believe from the evidence that the defendant did refuse to furnish the cars and transport said coal so purchased under said contract with said Keystone Mining & Manufacturing Company at said rate of $4.00 per car, and that the plaintiff in order to fill his said contracts, if any, was compelled to and did purchase elsewhere and deliver to in-
dustries, under said contract, in the Henderson terminals
328 having such switch or spur connection, as mentioned in evidence, any quantity of coal which could have been furnished by the said Keystone Mining & Manufacturing Company under its contract, aforesaid, for which he had to pay under the contract with the Keystone Mining & Manufacuring Company, based upon the rate of $4.00 per car above mentioned, then in that event the jury will find for the plaintiff and award to him such an amount in damages as will reasonably compensate him for the reasonable difference, if any, between what he was compelled to pay to procure said coal in car load lots and have it delivered from other sources, and what he would have had to pay if the defendant had furnished said cars and transported said coal to such industries; not exceeding upon the whole the sum of $12,000, the amount claimed in the petition, otherwise you will find for the defendant.

"2. The Court further instructs you that if you shall find for the

plaintiff you will not allow him anything for any coal delivered by him to the industries mentioned after the date which you may believe from the evidence the Keystone Mining & Manufacturing Company ceased operations or exhausted its supply of coal that it could have furnished plaintiff under said contract; or for any other coal ordered from or sold by plaintiff to industries not having such switch or spur connection with the defendant's said railroad track."

To the giving of which, and to the giving of each and all of them the defendant objected before they were given, but its objection *were* overruled, to which ruling the defendant at the time objected and excepted, and still excepts.

The defendant then requested and moved the Court to give to the Jury the following instructions:

"A." At the instance of the defendant, the Court instructs the jury that in estimating the damages, if any, sustained by the plaintiff by reason of the failure of the defendant, if it did fail,
329 to switch his coal from the Keystone mine to the different industrial plants in the City of Henderson having connection by spur tracks with defendant's road, then they can only allow plaintiff the difference, if any, that it would have cost him to deliver said coal at $4.00 per car and what it would have cost him to deliver it by any other means that he could reasonably have availed himself of at the time.

"B." In estimating the damages, if any, sustained by the plaintiff they can only take into consideration the coal that he had prior to the date of the contract with the Keystone Company contracted to sell and deliver to such industrial plants in the City of Henderson as then had physical connection by spur or switch with the railroad of the defendant."

But said motion and request was overruled as to both of said instructions, to which ruling the defendant at the time objected and excepted, and still excepts.

The foregoing were all the instructions that were given and all that were refused.

After the argument of Counsel the jury retired to their room and presently returned in Court the following verdict.

"We, the Jury find for the Plaintiff in the sum of $3,037.10.

T. W. BUCKNER, *Foreman.*"

Thereupon the defendant moved the Court to set aside the said verdict and the judgment herein and to grant the defendant a new trial of this action upon the following grounds and for the following reasons:

"The defendant moves the Court to set aside the verdict and judgment herein for the following reasons and upon the following grounds, viz:—

(1) The Court erred in overruling the defendant's motion to file its amended answer tendered September 5, 1911 and the second amended answer tendered Sptembr 11, 1911.

330 (2) The Court erred in excluding from the jury evidence tendered by it, to which ruling the defendant objected and

excepted at the time, and erred in admitting evidence over plaintiff's objections, to which ruling of the Court the defendant objected and excepted at the time, which evidence so excluded, and which evidence as admitted, and which rulings of the Court, the said objections and exceptions, are fully set forth and stated in the stenographer's transcript of the evidence which is referred to and made a part hereof, and marked for identification X as aforesaid.

(3) The Court erred in giving to the jury over defendant's objections instructions numbered 1 and 2 to which rulings of the Court and giving of said instructions the defendant at the time objected and excepted.

(4) The Court erred in overruling instructions marked A and B asked by the defendant to which ruling the defendant excepted and objected at the time.

(5) The verdict is excessive, and is not supported by the evidence, and is contrary to the law and the evidence".

Which motion for a new trial was afterwards overruled to which ruling of the Court the defendant at the time objected and excepted, and still excepts, and at the time prayed an appeal to the Court of Appeals which was granted and the defendant was given until and during the 45th. day of the present term (October 25, 1911) to prepare and tender its bill of exceptions and a transcript of the evidence.

And now on this the 42nd day of said term (October 21st, 1911) the said defendant appeared and tendered this, its bill of exceptions, and tendered also a transcript of the evidence heard on the trial of this case made by Miss Augusta Fitz Gibbon, the official stenographic reporter of this Court, and also a carbon copy of said transcript, both of which are ordered to be filed herewith marked X
331 and are made parts of the record of this case, and the original of said transcript is made a part of this bill of exceptions, and said original transcript shall be transmitted without being copied to the Clerk of the Court of Appeals as a part of the transcript of the record of this case, and the said carbon copy will remain on file in the office of the Clerk of this Court. The said transcript of the evidence contains all of the evidence heard on the trail of this case, together with all objections made thereto and rulings had and exceptions taken and contains all the exhibits used on the trial of the case.

This bill of exceptions is true, and is signed by the Judge of this Court and is ordered to be made and is made a part of the record of this case.

J. W. HENSON,
Judge of the Henderson Circuit Court.

STATE OF KENTUCKY,
County of Henderson, sct:

I, T. D. Alves, Clerk of the Henderson Circuit Court, same being a Court of record in and for the State and County aforesaid, do hereby certify that the foregoing 24 pages contain a true, full and complete transcript of record in the suit wherein Crescent Coal Company is plaintiff and Louisville & Nashville Railroad Company is

defendant as found of record in my office, and called for in defendant's schedule. Given under my hand as Clerk of said Court this the 16th day of November 1911.

Fee $13.90.

T. D. ALVES, *C. H. C. C.*,
By WILEY H. DIXON, *D. C.*

332 The Bill of Exceptions filed with the foregoing transcript is in words and figures following, to-wit:—

Henderson Circuit Court.

JO HIGDON, Doing Business under the Name of the Crescent Coal Company, Plaintiff,
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, Defendant.

Transcript of Evidence.

Clay & Clay, Counsel for Plaintiff.
Yeaman & Yeaman, Counsel for Defendant.

On October 4th, 1911 this case being called for trial and both parties having announced ready a jury was empanelled and the trial of the case proceeded with.

333 Witness JO HIGDON being called on his own behalf and being first duly sworn testified as follows:

Examined by JAS. W. CLAY, for plaintiff:

Q. Your name is Mr. Jo Higdon?
A. Yes sir.
Q. What is your occupation?
A. Superintendent of the Henderson Elevator.
Q. Are you engaged in any other business?
A. In the coal business under the name of Crescent Coal Company.
Q. Were you engaged in that business prior to July 1, 1908?
A. Yes sir.
Q. How long had you been engaged in the coal business at that time?
A. I think about a year but I am not positive.
Q. What is the firm's name*d*, the name under which you are doing your coal business?
A. Crescent Coal Company.
Q. Who is the owner of the Crescent Coal Company?
A. I am.
Q. I will get you to state whether or not some time prior to the 1st day of July 1908 you made any negotiations which resulted in your having a contract with the Keystone Mining & Manufacturing Company for supplying coal during the year?

A. Yes sir; I negotiated with the Keystone Mining & Manufacturing Company through my attorneys and entered into a contract to take 20,000 tons.

Q. I will get you to state whether or not that was made to you in the form of a written proposition?

A. Yes sir.

Q. I hand you a paper addressed to Clay & Clay, attorneys, and will get you to examine it and state whether or not that is
334 the proposition that was made to you, and if so by whom?

A. Yes sir; that is the proposition made to me, through my attorneys, by the Keystone Mining & Manufacturing Company.

Q. How long before the signing of the contract or the acceptance of the proposition was the proposition itself so made?

A. I think about a month before.

Q. Look at the date of the contract and state to the jury what is the date of that contract?

A. The date of this contract is May 14, 1908.

Plaintiff here offered to read the contract referred to in evidence, to the reading of which the defendant objected, which objection is overruled, to which ruling the defendant excepts. Said contract is in words and figures as follows:

"Messrs. Clay & Clay, Agents & Attorneys, Henderson, Ky.

GENTLEMEN: The Keystone Mining & Manufacturing Co. hereby agrees to sell to you, or to the party whom you represent the following grades of coal at the prices, and upon the terms herein below set forth. Contract to be in effect from July 1, 1908 to July 1, 1909, you, or your principal to have the privilege of renewing for another year at the expiration of the above period upon the same terms and conditions hereinafter set forth.

We agree to sell under the terms of this contract not less than ten thousand (10,000) tons, nor more than twenty thousand (20,000) tons, shipment to be made as ordered by buyer, but not to exceed two thousand (2,000) tons in any one month.

We agree to furnish all coal ordered up to the time limit above named f. o. b. cars, all coal delivered in cars on the L. & N. R. R. track at our mines, at the following prices, to-wit:

335

Lump	$1.30 per ton
Mine Run	.90 per ton
Lump and Nut mixed	1.10 per ton
Nut	1.00 per ton
Pea and Slack	.30 per ton

The seller agrees to furnish to the buyer all coal ordered, in such grades and in such quantities as it may order, provided, however, that if more than ten per cent of the tonnage ordered in any one month shall be lump coal, then the buyer shall also take and receive all the inferior grades made in screening the lump ordered in excess of such ten per cent; and provided further that if more than twenty-five per cent of the tonnage ordered in any one month shall be pea and slack, then the buyer shall, at the seller's option, be also

required to take and receive the higher grades resulting in making such pea and slack from the mine run; and provided further that the seller shall not be required to deliver, nor the buyer to receive a greater quantity of all grades combined than two thousand (2,000) tons in any one month, nor a greater quantity than twenty thousand (20,000) tons during the year, unless by express consent of both parties made at the time. It is agreed however, that of the total amount of coal ordered during the year not less than fifty per cent shall be mine run.

Payment shall be made for all coal delivered hereunder on or before the 10th day of each month, for all coal delivered during the preceding month.

It is further understood and agreed that this contract is made subject to strikes, unavoidable accidents, and car supply. The seller, however, agrees to use every reasonable effort to obtain the cars in which to load said coal for transportation, and shall only be released from liability on account thereof upon the failure of
336 the railroad company to deliver cars as ordered. Failure to obtain cars at one time shall be no cause for a cancellation of this contract, and shall only release the seller from liability during the period in which cars cannot be obtained, nor shall the buyer be responsible in the event the seller shall be unable to obtain cars in which to load same.

Any modification of any clause of this contract, or of price, made in writing from time to time shall in no way invalidate this contract, and no modification shall take place unless reduced to writing and signed by the parties.

It is distinctly understood that the terms of payment herein provided for, are of the essence of this contract and a non-compliance therewith gives the seller the privilege of cancellation.

The seller, the Keystone Mining & Manufacturing Co. submits this proposition for your acceptance and agrees that the same shall become binding when the provisions thereof shall have been accepted by you as the agent of the buyer, or by the buyer, provided however, that the guarantee hereinafter set forth shall be signed, by some good and solvent person as surety.

Witness the hands of the Keystone Mining & Manufacturing Co., by L. A. Bosserman this 5th day of April 1908.

KEYSTONE MINING & MANUFACTURING CO.,
By L. A. BOSSERMAN, *Treas.*

We accept the provisions of the foregoing proposal and agree to order not less than ten thousand (10,000) tons, nor more than twenty thousand (20,000) tons of coal a year, under the terms and conditions as above set forth.

Witness our hands this 14th day of May 1908.

CRESCENT COAL CO.
By JO HIGDON.

337 The undersigned, C. M. Bullitt hereby covenants and agrees to and with the Keystone Mining & Manufacturing Co., that the aforesaid Crescent Coal Co. shall well and truly do and perform

the terms and conditions of the foregoing contract, and shall on or before the 10th day of each month pay to the said Keystone Mining & Manufacturing Company the full amount due it by said Crescent Coal Co. for all coal delivered to the said Crescent Coal Co. for the preceding month.

Given under my hand this the 14th day of May 1908.

C. M. BULLITT."

Q. That written proposition and acceptance constitutes the contract made between you and the Keystone Company?

A. Yes sir.

Q. I will get you to state whether or not before or after making the contract with the Keystone Mining & Manufacturing Co. you made or entered into any contract or arrangement with coal consumers having connection with the railroad switches for their supply of coal during the year or during any portion of the year.

A. Before entering into the contract I had an option and during the life of that option I made a contract with A. Waller Co. for 6000 tons of coal a year, and with the Henderson Elevator and the Henderson Chair Factory.

By agreement and owing to the fact that the witness C. M. Bullitt is compelled to leave the City he is here introduced as a witness.

The said C. M. BULLITT being first duly sworn testified as follows:

Examined by Mr. JAS. W. CLAY, for pl'ff:

338 Q. Mr. Bullitt where do you live and what is your occupation?

A. My residence is Louisville, Ky.; I am in the grain business in Henderson,—I am president of the Henderson Elevator Company.

Q. What official position *to* you hold with your Company?

A. President.

Q. You spend most of your time in Henderson?

A. About five days out of the week.

Q. You give the business of the Henderson Elevator your personal attention?

A. Yes sir.

Q. I will get you to state whether or not you were president of the Henderson Elevator in March and April 1908?

A. Yes sir; I was.

Q. State whether or not in either March or April 1908 you purchased a car load of coal from the Keystone mine and if so state the facts in connection with the purchase and how it come to be delivered to your plant?

A. I purchased a car of coal from the Keystone Mining & Manufacturing Co. I think it was in March 1908. The facts in the case were, that just about that time this young man that was here in charge, Mr. Bosserman I believe was his name, was boarding at the

same place with me and we were discussing the business and he was speaking about the dull trade in coal owing to freight rates and he was willing to sell his coal pretty cheap but could not get it moved and we finally came to the point and I asked him what he would take f. o. b. cars for coal and it was so much cheaper—And he said, if you can *the* get them switched—The fact was that I finally bought the car of coal from him.

Q. What point?

A. F. o. b. cars at his mines out there.

339 Q. You were to pay the switching charges?

A. Yes sir; I was to pay the switching charges.

Q. After you had bought the car of coal, what directions, if any, did you give the Railroad Company?

A. I called up the Railroad Company and told them I had bought a car of coal at the mines there.

Objection by Defendant. Overruled. Exception.

Q. I will ask you what directions you gave the Railroad Company, what instructions?

A. I simply told them I had bought a car of coal and asked them to put the car there to load it and switch it down and I would pay the freight on it and they did. The- evidently put the car there because the car was delivered to me and I unloaded the car of coal.

Q. How was that car delivered to you?

A. L. & N. switched it over on to my track.

Q. Has the Keystone any connection, or had it at that time connection with the railroad by switch?

A. Yes sir.

Q. Was your plant connected with the railroad by switch?

A. Yes sir.

Q. They stated they would deliver the car of coal to your plant?

A. Yes sir.

Q. What rate did you pay for that car of coal?

A. I paid the Railroad Co. $2 for the car and $2 switching it from the mines to my elevator.

Q. Making $4 a car?

A. No sir; $2. They afterwards changed the tariff and made it $2 for switching and $2 for car rental.

Q. That made a charge of $2 for the total service?

340 A. Yes sir; That is my remembrance, I am not sure. It is barely possible they charged $4 but I think $2.

Q. State whether or not they charged under the Terminal Tariff then in force?

A. Yes sir. I am quite sure it was the tariff of $2 per car.

Q. At the time you gave the order for the placing of the car and the performance of that service was any objection made to the performance of the service by the Railroad Company?

A. No sir; not at that time.

Q. It did perform the service and you paid the rate?

A. Yes sir.

Q. I will ask you whether or not you told Mr. Higdon about that service having been performed?

Objection by Defendant. Overruled. Exception.

A. Yes, I necessarily told him. He was the superintendent of the elevator and I told him I had bought this car of coal to be delivered and when it came to unload it.

Q. I will ask you whether at that time anything was said by Mr. Powell, agent of the Railroad Company about a car having been loaded at the Keystone mine for shipment elsewhere and they shipped that car of coal to you?

A. No I have no recollection about it at all. Either the next day or the day after I did have a conversation with Mr. Powell about something else—I mean to say that he said later that the Company did not want to switch any more and that they would rather not do it.

Q. At whose request was the car placed at the Keystone mine?

A. At my personal request.

Q. What agent of the Company did you make the request of?

341 A. I called up the L. & N. office, I think the Chief Clerk answered the telephone and told me that he would attend to it.

Q. Whoever it was it was some one in the office?

A. If I remember correctly it was the Chief Clerk.

Q. About how long after the car was ordered before it was received?

A. I think, perhaps, a day or two after. The service was prompt.

Q. I will ask you whether or not some time prior to July 1, 1908 your Company made any contract with the Crescent Coal Company for furnishing coal to your plant as needed?

A. Yes sir.

Q. They did make such a contract with the Crescent Coal Company?

A. Yes sir.

Q. Covering what period was that contract?

A. I think at that time we made a contract for the year.

Q. Was the contract in writing?

A. Yes sir; I am sure it was in writing.

Q. Do you know where that contract is?

A. Not unless it is in my office. I don't know that it is there now. Its all over and gone and those papers were thrown around. I am not sure that it could be found. I am sure the contract was made in writing.

Q. Do you remember what date that contract called for?

A. I think we made the contract from the 1st of July 1908 to the 1st of July 1909.

Defendant objects to any statement in regard to the contract which objection is sustained. Exception.

Q. I will ask you whether or not during the period the Crescent Coal Company did furnish to the Henderson Elevator Co. that coal?
A. Yes sir; they furnished us coal.

342 Cross-examined by Mr. MALCOLM YEAMEN for Defendant.

Q. When was it that you gave this order to the Keystone for this car load of coal?
A. I think in March 1908, I am not sure. The latter part of March or the 1st of April.
Q. For the use of your elevator?
A. Yes sir.
Q. How much coal was your elevator using then per day or month at that time?
A. It varies, depends upon how busy we are. I should say as a rough guess 1800 or 2000 tons a year.
Q. You ordered one car load of the Keystone mine?
A. We usually get one car at a time; that's all we can take care of.
Q. Did you ever order any before from the Keystone?
A. I never heard of it before; I think this came up at the breakfast table——
Q. You knew that the Keystone was operating here in Henderson?
A. Yes sir.
Q. Had you ever applied to them for any bid on coal?
A. Yes, when they first started they supplied us with some coal by wagons at different times. When they were running the old mine they supplied us with coal from there.
Q. I mean what is known as the Keystone mine?
A. No I had never gotten a car load of coal there before.
Q. You never applied for a car load of coal?
A. No sir.
Q. Never inquired what you could get it for?
A. No sir; I don't pay much attention to that part of it.
Q. But you did order one car load in March 1908 and that car load was switched to your elevator from the Keystone mines?
343 A. Yes sir.
Q. The next day or the second day afterwards; when was it you told Mr. Higdon about having gotten that car load of coal?
A. I don't know; I would say that I probably told him that day in the course of business that I had made arrangements to get this car of coal.
Q. How did you come to tell Mr. Higdon?
A. I would have to tell him about it; he is superintendent of the elevator, to let him know about it. If the car was put there and he didn't know anything about it, he wouldn't know what to do with it.
Q. He was your superintendent of the elevator?
A. Yes sir.
Q. You told him you had bought this car of coal of the Keystone and ordered it switched out to your elevator?
A. Yes sir.

Q. Was that the reason you told him?
A. Yes sir.
Q. The only reason?
A. Yes sir.
Q. You were his surety afterwards in the contract that he made with the Keystone mine?
A. I was; yes sir.
Q. You had some conversations with him about the contract had you not?
A. Yes sir.
Q. You were anxious to see him conclude it?
A. I was, because I expected to get cheaper coal.
Q. Afterwards Mr. Powell told you he could not perform that sort of service?
A. Yes sir.
344 Q. When was that?
A. I don't know whether it was in my own office or talking over the 'phone. It may have been at his office. I think he said he had received orders not to switch any more.
Q. In a very short time after you told Mr. Higdon that you had gotten one car load Mr. Powell told you that he could not perform that switching service?
A. Yes sir.
Q. Did you tell Mr. Higdon anything about that subsequent conversation?
A. I should say I did. I would rather say, I did.
Q. And that was in March 1908?
A. Yes sir.
Q. You use, I believe you say, how many tons a year?
A. I should say 1800 or 2000 tons.
Q. What proportion of that coal that you use is slack and pea?
A. We prefer to use the slack and pea when we can get it but there are times when we can't get it. It depends on the price. If we could get mine run based on certain prices we prefer to use it.
Q. On an average at that time what would be the proportion of pea and slack that you used?
A. We were using pea and slack entirely when we could get it.
Q. What was the proportion?
A. I don't know that we used—I would say 75 or 80 per cent.
Q. And you always used it when you could get it?
A. Yes sir. We would use the other if the price was cheaper; that is the mine run coal, it, of course, burns better and makes a hotter fire than pea and slack.
345 Q. And costs about two or three times as much?
A. No not three times as much; depends on where you get it. If you bring it from Madisonville the freight on the pea and slack is the same as on the mine run and therefore it reduces the price in percentage. It may cost at the mines three times as much but the freight is the same.
Q. What were you paying in March 1909 for pea and slack?

A. I should say about 85 or 90 cents. I mean in the winter it went as high as $1 when it was scarce.

Q. That was what it cost you delivered at your elevator?

A. Yes sir.

Q. Who furnished you the coal that you used between July 1, 1908 and July 1, 1909?

A. I think the Crescent Coal Co. furnished us entirely.

Q. That is Mr. Higdon?

A. Yes sir; perhaps we might have bought a few cars from the St. Bernard Mining Company occasionally, but as a rule we bought all the coal from Mr. Higdon.

Q. Had you always bought it from the Crescent Coal Co. since Mr. Higdon has been with you and in the coal business?

A. Almost entirely; sometimes from these other agents, sometimes he didn't have it.

Q. You still buy from him?

A. Yes sir; we bought all our coal from him.

Q. Your books would show what quantity of coal you used between July 1, 1908 and July 1, 1909 would they not?

A. Yes sir; I suppose they would.

Q. Who was your book-keeper at that time?

A. I have two or three book-keeper's. Mr. Eastin is one of the-.

Q. Is he the only one?

346 A. Mr. Miller.

Q. He could make a statement of the quantity and send it up?

A. Yes sir; he would have to take it out of the books and it would take him some time.

Q. Will you instruct him to make such a statement?

A. Yes sir; if I can get to the office in time.

Q. Telephone him and ask him to make that statement if he can, making it this way: How much coal you used between July 1, 1908 and July 1, 1909 and how much slack, of whom it was purchased and the price.

A. I will.

Redirect examination by JAS. W. CLAY for Pl'ff:

Q. I will ask you to state whether or not in the conduct of the business of the Henderson Elevator Co. you shipped grain, wheat, corn or any other commodity from your elevator to any of the industries in the City of Henderson during the time immediately preceding July 1, 1908 and from the 1st of July 1908 to the 1st of July 1909?

A. Yes sir.

Q. From what time have you done that?

A. Ever since I have been in the business here, for the last 10 or 14 years.

Q. Give the jury the name of some of the industries you are in the habit of shipping to during that period?

A. We loaded out grain and switched cars around there to Marshal & Alves, to the City mills and A. Waller & Co. or wherever they wanted grain or cobs.

Q. I will ask you whether or not in shipping grain from your plant to Marshall & Alves that grain passes by the plant of the Keystone mine?

A. Yes sir; it is down on the belt line.

347 Q. What tariff did the Railroad charge you for that service?

A. Originally I think our tariff was $2 and afterwards it was changed to $4.

Q. I will ask you whether or not the service was done under the terminal tariff rate of the L. & N.?

A. Yes sir; whatever that was at that time.

Q. I will ask you whether that tariff was $4 beginning July 1, 1908?

A. I don't remember just when that tariff was put into effect. I know about the time the tariff was changed.

Q. There is the effective date of that tariff. (Shows the witness the Terminal Tariff book.)

A. The date is May 4, 1908. I remember it now by looking at the tariff. May 1908 the tariff rate was increased from $2 to $4.

Q. Since May 1908 what tariff rate have you paid?

A. $4.

Q. That $4 rate is still in effect?

A. Yes sir.

Recross-examination by Mr. MALCOLM YEAMAN for Def't:

Q. What shipments since May 1908 have you been paying $4 on?

A. Anything we loaded and switched around to any of the other industries that bought from us, corn, wheat or oats.

Q. You mean you have loaded corn, wheat or oats at your plant to be shipped to other plants?

A. Yes sir.

Q. Where did they come into your plant from?

A. That would be hard to say.

Q. Out of the city, come in on railroads or steam-boats?

A. Not necessarily. It might have been stuff hauled to us by wagon.

348 Q. Was it or not all done under the arrangement that is known as shipping or milling in transit business?

A. No sir; it couldn't possibly have been milling in transit.

Q. Can you state to the jury any shipment that you made of grain, corn, wheat or oats that was not grain that had come in from some point on the railroad?

A. I couldn't state that positively, because we shipped a great deal of wheat down to the miller out of my elevator and I couldn't state positively whether it came in by steamboat, railroad or wagon. I could not state that positively.

Q. Did you have any interest, direct or indirect in this contract of Mr. Higdon's with the Keystone except to become his surety?

A. No sir.

Q. None at all?

A. No sir.

Mr. JAS. W. CLAY for Pl'ff:

Q. Mr. Yeaman asked you about milling in transit; if this didn't come under that arrangement, the milling in transit arrangement; don't you have to make certain statements that grain received comes from a certain point?

A. We do.

Q. Were any of these questions asked you at all on these shipments?

A. No.

Witness Jo HIGDON is recalled and proceeded with as follows:

Mr. JAS. W. CLAY for Pl'ff:

349 Q. I hand you a paper dated May 26, 1908, Henderson which purports to be a paper between you and A. Waller Co. examine that paper and state what it is.

A. This is a contract made May 26, 1908 between the Crescent Coal Co. and A. Maller & Company for six thousand tons of pea and slack and mine run coal.

Plaintiff then offered said contract of date May 26, 1908 in evidence, to the reading of which defendant objected, which objection is overruled to which defendant excepts for the reason that it only purports to be a contract for the delivery of coal but no evidence that coal was delivered under it. Said contract is in words and figures as follows:

"HENDERSON, KY., *May* 26, 1908.

This agreement made this the 26th day of May 1908 by and between the Crescent Coal Company, hereinafter known as the seller, and A. Waller & Company, hereinafter known as the buyer.

Witnesseth: The seller agrees to sell and deliver to the buyer their needed supply of coal during a period of one year, beginning July 1st, 1908, estimated at 6000 six thousand tons at the following prices: Pea & slack 80¢ per ton, mine run $1.25 per ton f. o. b. cars their track.

The seller agrees to use due diligence in supplying the coal as ordered by the buyer, but it is expressly understood that in the event of strikes or delays either at the mine or by the railroad, the seller is not to be held liable under this contract.

The seller agrees that not less than 75% of the coal furnished shall be Pea & Slack. All coal delivered during each month is to be paid for on or before the 9th day of the month following.

350 Witness our hands this the day and date first above written.

CRESCENT COAL COMPANY.
By JO HIGDON.
A. WALLER & COMPANY.
By A. WALLER, *Pres't.*"

Q. I will ask you whether or not you did deliver A. Waller any steam coal under that contract during the year beginning July 1, 1908?

A. Yes sir; I delivered them coal under that contract.

Q. State to the jury if you can the exact quantity of coal that you did deliver under the contract?

A. I don't remember the exact figures, but something like 4,400 tons, I have a statement in the book if I may be permitted to look at it.

Q. You may look at it for the purpose of refreshing your recollection.

A. Between July 1, and June 1, 1909, 4,326 tons.

Q. That is the actual tonnage that you delivered?

A. Yes sir.

Q. Was that what is known as steam coal?

A. Yes sir.

Q. State whether or not you had any arrangement with the Henderson Elevator Co. for their supply of coal?

A. Yes sir; I had a contract with the Henderson Elevator.

Q. Did you deliver them that coal?

A. Yes sir.

Q. I wish you would state to the jury the number of tons that you delivered to the Henderson elevator between the 1st day of July 1908 and the 1st day of June 1909?

351 A. I delivered to the Henderson Elevator 745 tons. No 787 tons instead of 745 tons.

Q. Mr. Bullitt says that the usual consumption of coal was 1,800 or 2,000 tons; why, if you know, was the quantity during the year only 787 tons?

A. Our usual consumption is about one car load a week and that would run it between 1,900 and 2,100 tons a year but during this year we burned quite a number of cobs to make steam and in burning the cobs we had no use for the coal.

Q. There was no market for the cobs, and so as a matter of fact you only bought 787 tons?

A. Yes sir.

Q. I will ask you whether or not you had any contract with the City of Henderson for the supply of the electric light plant?

A. Yes sir.

Q. Did you furnish the electric light plant any coal during that year from July 1, 1908, to June 1, 1909?

A. I furnished them all the coal they required for the use of the plant, except possibly in the month of February, part of February and March.

Q. Do you remember whether you furnished them any during April?

A. I don't remember, I think I did.

Q. I will ask you to state to the jury the total quantity in tons, of coal that you furnished the electric light plant between the first day of July, 1908, and the first day of June, 1909?

A. 3,614 tons.

Q. I will ask you to state whether or not you had any arrangements with the Henderson Chair Factory for the supply of coal?
A. Yes sir; I had a contract.
Q. With whom was that contract made?
A. I think the sale was made through Mr. Haley.
Q. What position did Mr. Haley occupy with that Company?
A. I think he was one of the managers or superintendent.
352 Q. Did Mr. Judson A. Wilson have anything to do with making the contract?
A. I think not, sir.
Q. Did you furnish that Company any coal during the year from July 1, 1908 to June 1, 1909?
A. Yes sir.
Q. How much?
A. I furnished the chair factory 216 tons.
Q. I will ask you Mr. Higdon, whether or not the various industries that you have mentioned had railroad track and switch connection with the railroad of the defendant?
A. Yes sir.
Q. Did you furnish any other of the manufacturing plants in the City with coal?
A. Yes sir.
Q. I will ask you whether or not the other parties you mention had a contract or arrangement in writing or if you had an agreement by which to furnish their supply for coal for the year?
A. Yes sir.
Q. Did you have a contract with any other person?
A. I had a contract with the City water works.
Q. I will ask you whether or not you delivered the coal to the Henderson City Water Works under that contract?
A. Yes sir.
Q. How much did you deliver them under that contract?
A. 955 tons.
Q. Anybody else?
A. I had an agreement with George Delvin, Delker Bros. and A. B. Jarvis.
Q. Under those agreements were you to furnish them their coal for the year?
A. Yes sir.
Q. What quantity of coal did you furnish A. B. Jarvis?
A. 203 tons.
353 Q. You say you had an arrangement with Delker Bros.?
A. Yes sir.
Q. How much coal did you furnish them?
A. 301 tons.
Q. Who else was it?
A. Delvin's foundry.
Q. How much did you furnish him?
A. 170 tons.
Q. Was there anybody else you had a contract with?
A. I think that was all the industries.

Q. The quantity that you have given of those various ones, between what period was that?

A. Between July 1, 1908 and June 1, 1909.

Q. None of these figures that you have given on any of these covers the month of June 1909?

A. No sir.

Q. I will ask you Mr. Higdon, whether or not,—just state to the jury whether or not you made any effort to get the Railroad Company to furnish the cars to deliver this coal, and what effort you made, and what was the result of these efforts?

A. I did make an effort. After I had made the contract with the Keystone mine I asked them to switch some coal.

Q. You asked the L. & N. to switch some coal?

A. I asked the L. & N. to furnish cars to the Keystone mine in which to transport this coal from the mines.

Q. With whom were the negotiation- with the L. & N., with whom did you have your interviews and correspondence, what agent, or what man in the employ of the railroad?

A. The correspondence was addressed to Mr. Powell, the agent but in calling by phone the Clerk in charge would answer.

354 It wouldn't always be Mr. Powell talking.

Q. I hand you a paper dated July 2, 1908; I will get you to examine that and state what it is.

A. That is a letter from the Crescent Coal Company to R. W. Powell confirming a telephone conversation where t-o cars were ordered.

Q. Is that the original letter or a copy?

A. That is a copy.

Defendant objects upon the ground of incompetency and not because it is a copy. Objection overruled. Exception.

Said letter is here read and is in words and figures as follows:

"JULY 2, 1908.

R. W. Powell, Agent Louisville & Nashville R. R. Co., Henderson, Ky.

DEAR SIR: This is to confirm our telephone conversation of this P. M. wherein I ordered two (2) empty coal cars placed at the mines of the Henderson Mining & Man'f'g Co., to be loaded with coal, and switched to the Henderson City Electric Light Plant and A. Waller & Co., under tariff that now governs switching charges at Henderson.

Yours truly, CRESCENT COAL COMPANY,
By JOE HIGDON."

Q. I will ask you what was done with the letter of which that is a copy?

A. That was mailed to Mr. Powell, the agent of the L. & N.

Q. I hand you a paper dated Henderson, Kentucky, July 3, 1908 and ask you to examine that and state what it is?

A. That is a letter from Mr. Powell to the Crescent Coal
355 Company acknowledging receipt of the order.

Q. How did you receive that letter?

A. By mail I presume.

Q. Are you acquainted with the signature of Mr. R. W. Powell?

A. Yes sir.

Q. What official position does he hold with the railroad?

A. Agent.

Q. I will ask you whether or not the signature to that letter is Mr. Powell's?

A. Yes sir.

Plaintiff then offered to read *to read* said letter to which defendant objected upon the ground of incompetency, objection overruled; exception.

Said letter is in words and figures as follows:

"HENDERSON, KY., *July* 3, 1908.

Crescent Coal Co., C/o J. D. Higdon, City.

DEAR SIR: I am in receipt of your orders of the 1st and 2nd for two coal cars to be placed at Keystone Mines for switching purposes.

As previously advised: we cannot undertake to furnish the mines with cars for switching coal from their tracks to private sidings or other tracks within Henderson switching limits, in absence of specific instructions.

We have taken the matter up with our General Freight Office and will advise you as early as possible. I think it would be well for you to take this up with either Capt. Howell, General Freight Agent, Evansville, or Mr. D. M. Goodwyn, G. F. A. Louisville.

Yours truly, R. W. POWELL, *Agent.*"

356 Q. I hand you a paper dated July 1, 1908 and I will get you to examine it and state what that is?

A. That is a confirmation of a telephone order for cars from the Crescent Coal Company to the L. & N.

Q. Is that a copy or the original letter?

A. Copy.

Q. What was done to the original?

A. Mailed to Mr. Powell.

Objection by defendant upon the ground of incompetency and not because it is a copy.

Said letter is here read and is in words and figures as follows:

"HENDERSON, KY., *July* 1, 1908.

Mr. R. W. Powell, Agent Louisville & Nashville R. R. Co., Henderson, Ky.

DEAR SIR: Confirming our telephone communication of this P. M. wherein I ordered two (2) empty coal cars placed at the mines of the Keystone Mining & M'f'g Co. to be loaded with coal

and switched to the Henderson Elevator Co. and A. Waller & Co. under tariff that now governs switching charges at Henderson.

Yours truly, CRESCENT COAL COMPANY,
By JO HIGDON."

Q. I hand you a paper dated Henderson, Ky. July 13, 1908, examine that and state what that is?

A. That is a letter from Mr. R. W. Powell, Agent to the Crescent Coal Company stating that they would not furnish cars for switching coal.

Q. Is that letter signed by Mr. Powell?

A. Yes sir.

Q. In his own hand writing?

A. Yes sir.

357 Defendant objects to the reading of said letter upon the ground of incompetency. Overruled. Exception.

Said letter is in words and figures as follows:

"HENDERSON, KY., *July* 13, 1908.

Mr. Jo Higdon, *D/o* Crescent Coal Co., Henderson, Ky.

DEAR SIR: Referring to your various requests, for cars to be placed on the tracks of the Keystone Mining & Manufacturing Company to be loaded with coal and switched to various industrial plants in the City.

We cannot furnish the Keystone Mining & Manufacturing Company or any other similar concern with cars for switching coal to points within the yard limits at Henderson at the switching rate. We are willing to put into effect, when advised of its acceptance, a rate of 50 cts. per ton from the Keystone Mines to Henderson yard deliveries, which is the same as the rate from Sebree, Ky., the nearest mine to Henderson.

Yours truly, R. W. POWELL, *Agent.*

R. W. P./x.

Q. I hand you a paper dated July 7, 1908, examine that and state what it is?

A. That is a letter from the Crescent Coal Company to R. W. Powell, Agent, confirming a telephone communication for cars?

Q. What was done with the original of which this is a copy?

A. Mailed to Mr. Powell.

Defendant objects upon the ground of incompetency and not because it is a copy. Overruled. Exception.

358 Said letter is in words and figures as follows:

"HENDERSON, KY., *July* 7, '8.

R. W. Powell, Ag't, City.

DEAR SIR: Confirming our telephone communication of July 6th & 7th we ordered two coal cars placed at Keystone Mining Co. to be

loaded with coal and switched to the Electric Light plant. Authority the tariff that now controls your switching arrangement at Henderson.

Yours truly, CRESCENT COAL COMPANY,
JO HIGDON."

Q. I hand you a letter or paper dated July 16th and ask you to state what that is?

A. That is a letter from Mr. Powell to the Crescent Coal Co. and the Keystone Mining & Manufacturing Company.

Q. The original letter is it?

A. Yes sir.

Defendant objects to its being read because of incompetency; overruled. Exception. Said letter is in words and figures as follows:

"HENDERSON, KY., *July* 16, 1908.

Keystone Mining & Manufacturing Co., Crescent Coal Co., City.

GENTLEMEN: Switching Coal within Yard Limits at Henderson.

With reference to furnishing Keystone Mining & Manufacturing Co. with cars for movement of coal from that plant to the various industrial plants within the City of Henderson.

359 Please understand that we will furnish cars for this movement on basis of 50 cents per ton.

Yours truly, R. W. POWELL, *Agent.*"

R. W. P./x.

Q. I hand you a paper dated August 13, 1908, examine that and state what it is?

A. That is a letter from R. W. Powell to the Crescent Coal Company stating that they would not handle coal.

Q. Is that the original letter?

A. Yes sir.

Defendant objects upon the ground of incompetency. Overruled. Exception. Said letter is in words and figures as follows:

"HENDERSON, KY., *August* 13, 1908.

Crescent Coal Co., City.

GENTLEMEN: Handling Coal Within Yard Limits at Henderson—

Please refer to my letter of July 16th, advising that we would furnish the Keystone Mining & Manufacturing Co. with empty cars for lo-ding coal to be switched to the various commercial industries within Henderson yard limits, and perform the service for a charge of 50 cents per ton.

I am now in receipt of instructions to the effect that we will not undertake to handle this coal at all. This for your information.

Yours truly, R. W. POWELL, *Agent.*"

Q. I hand you a paper dated August 26, 1908 and asked you to examine that and state what it is?

A. A letter from the Crescent Coal Company to R. W. Powell.

Q. Copy or original?

360 A. Copy.

Q. What was done with the original?

A. Sent to R. W. Powell.

Defendant objects because of incompetency and not because it is a copy. Overruled. Exception. Said letter is in words and figures as follows:

"HENDERSON, KY., *August 26th*, 1908.

Mr. R. W. Powell, Agent, Louisville & Nashville Railroad Co., Henderson, Ky.

DEAR SIR: We herewith tender you the sum of four dollars, lawful money of the United States, the amount named in your tariff of rates, for furnishing cars and transporting or switching same from one plant to another, within the switching limits of the City of Henderson, to-wit: $2.00 to cover switching charge, and $2.00 to cover car rental.

You are hereby ordered and instructed to place an empty coal car at the mine of the Keystone Mining & Manufacturing Co., on its switch, there to be loaded wth coal and transported or switched and delivered to the milling plant of A. Waller & Co., on its switch. Both of these points are connected with the Louisville & Nashville Railroad, both of them have switches at their plants, and both of them are within the switching limits of the City of Henderson, Ky.

Yours truly".

—— ——.

Q. I will ask you whether the Keystone mine had any switch connection with the L. & N.?

A. Yes sir.

Q. State whether or not A. Waller & Co. had any switch connection with the L. & N.?

361 A. Yes sir.

Q. I will ask you whether or not of your knowledge the plant of the Keystone Mining & Manufacturing Company and the switch of the Keystone Mining & Manufacturing Co. is within the terminal or switching limits of the City of Henderson?

A. They are in the switching limits.

Q. State whether A. Waller & Company's plant was in the terminal or switching limits?

A. They are in the switching limits.

Q. I will ask you whether or not all of the plants that you have mentioned are in the switching limits?

A. Yes sir; all that I named.

Q. All that you sold coal to?

A. Yes sir.

Q. What is the average capacity of one of the empty coal cars?

A. About 40 tons, 80,000 capacity. There are a few over and a few some less.

Q. Average about 40 tons you say?

A. Yes sir.

Q. For the purpose of making your calculation at the rate of $4 per car, what was the rate per ton?

A. 10 cents a ton.

Q. I will ask you to state to the jury whether or not the L. & N. ever withdrew its refusal to furnish cars for this service?

A. No sir.

Q. In addition to the letters read, did you have any conversation with Mr. R. W. Powell about that service, furnishing the cars or performing the switching services?

A. Yes sir.

362 Q. What would he tell you in those conversations?

A. I had a conversation with Mr. Powell about switching coal after I entered into the contract and he stated that he could not switch more than he had switched for me until he had specific instructions on the subject.

Q. Did you have any subsequent conversation with him?

A. I don't remember, perhaps I have seen him and had some with him.

Q. That letter of August 26, 1908 that was read in which you mention a tender of $4, I will ask you whether or not you tendered that amount to the Railroad Company for that service?

A. Yes sir.

Q. What was your usual custom of doing business with the Railroad with regard to the collection of your freight bills, was it on a cash or weekly or monthly settlement basis?

A. I had no agreement.

Q. You had been in the business a year or so, during that time you had shipped coal and received them from the L. & N., the freight bills?

A. Yes sir.

Q. During that time what was your custom in doing business with regard to paying the freight bills?

A. Usually once a week, every Monday morning, and sometimes two weeks.

Q. During that time had the railroad ever demand- of you the cash before the delivery of the car?

A. No sir.

Q. In any conversation or communication did Mr. Powell or the L. & N. demand a cash payment for the performance of this service?

A. No sir.

363 Q. I will get you to state to the jury, after the Railroad Company refused to perform this service what arrangements you made for getting coal to fill your contract, where you had to get the coal?

A. I had to go into the market and buy coal in the open market, to fill my contracts.

Q. Your contract was to be delivered how?

A. In car load lots in Henderson.

Q. Your contract with the Keystone provided for only car load lots?

A. Yes sir.

Q. Is there any other mine in the City of Henderson that you could have gotten coal from in car load lots?

A. No sir.

Q. Any other mine having switch connection with the Railroad?

A. No sir.

Q. To get the coal where did you say you had to go?

A. Into the open market. I bought it in Baskett, Hopkins, Union and Webster Counties.

Q. What rate of freight did you have to pay on the coal that you brought to the City from elsewhere?

A. 50 cents a tons.

Q. These cars average the same amount as the others?

A. Yes sir; about 40 tons to the car.

Q. You said you paid 50 cents a ton for coal?

A. Yes sir.

Q. I will ask you whether or not during the period from July 1, 1908 to June 1, 1909 you succeeded in getting any coal at all upon which you paid a less freight rate than 50 cents a ton?

A. No sir.

364 Q. Upon all that coal you paid 50 cents a ton?

A. Yes sir.

Q. That 50 cents a ton was paid to whom?

A. The L. & N. I. C. or any other railroad that brought in coal.

Q. I will ask you whether or not you paid these freight rates of 50 cents a ton on the shipments as they were made?

A. Yes sir.

Q. Was any of this coal that you have mentioned as delivered to these manufacturing plants what is known as domestic coal, or what class of coal was it?

A. Steam coal, which means pea and slack or mine run coal.

Q. Either passed slack or mine run coal?

A. Yes sir.

Q. You were at the same time in the business of furnishing lump to private consumers?

Objection by defendant.

Q. Where you handled lump coal to the private individuals throughout the City?

A. Yes sir.

Q. You in this suit are not claiming anything for that part that was not handled in car load lots?

A. No sir.

Q. I hand you a book marked "L. & N. R. R. Tariff G. F. O. No. 1075 effective May 4, 1908," I will get you to examine that tariff and state what it is?

A. Terminal Tariff with rules and regulations of the switching charges.

Q. I will ask you where you got that tariff?

A. From the L. & N.

Q. Who gave it to you?

365 A. Through Mr. Powell's office.

Q. Does the tariff that you have just mentioned embrace the tariff in effect at Henderson, Kentucky?

A. Yes sir.

Plaintiff at this point read to the jury from page 130 of the tariff rates, rules and regulations, governing the switching of cars at Henderson, Kentucky, sub-section 9, which provides:

"The L. & N. R. R. does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Ky. Terminals, but where any such service is performed as an accommodation a charge of $2 per car plus $2 per car for car rental shall be assessed."

Q. I will ask you whether or not that was the tariff that you had reference to in your correspondence, of $4 a car for the service that you demanded?

A. Yes sir; that was the tariff.

Q. I will ask you whether or not prior to the making of this contract with the Keystone Mining Co. the L. & N. R. R. Co. switched any coal or furnished cars and switched coal from the Keystone Mining & Manfg. Co. plant to any of the industries in the city of Henderson for you?

A. Yes sir.

Q. When and under what condition was that service performed?

A. I think in May they switched a car of coal to the Electric Light Plant from the Keystone.

Q. Prior to July?

A. Yes sir.

Q. What were the circumstances under which that was switched?

366 A. I ordered that from the Keystone during my option; I ordered that car from the L. & N. to be placed at the Keystone mine and switched to the electric light plant.

Q. Did they perform that service?

A. Yes sir.

Q. What did you pay?

A. $2.

Q. Was that prior or after this tariff went into effect?

A. I think it was $2 and prior to this tariff.

Q. That was this old tariff for that kind of service?

A. Yes sir; a flat rate of $2 for the switching service and no car rental charge.

Q. Otherwise the provisions are the same?

A. Yes sir.

Q. Did they perform any other service, ship any other coal?

A. After the contract was entered into they switched three car

loads from the Keystone mine to the Electric Light plant during the month of June.

Q. Under what circumstances was that service performed?

A. These cars were ordered from the L. & N. by telephone and furnished and loaded at the Keystone mine and switched back by the L. & N. R. R. to the Electric Light plant.

Q. What did you pay for these cars?

A. $4.

Q. It was after that the L. & N. refused to perform the service?

A. Yes sir.

Q. Do you know from your own experience and own knowledge and observation as superintendent of the Henderson Elevator Co. whether or not the railroad had performed similar service for other industries for their shipments?

367 A. Yes sir; they did.

Q. Previously or during the time that the contract was in force?

A. Previous and during that time and up to this time.

Q. What kind of service to your knowledge did it perform?

A. They had switched for the Elevator Company corn and wheat and shipped cobs from the Henderson Elevator to A. Waller's and mixed car loads of grain to Marshall & Alves Coal Yard, part hay and part corn.

Q. Do you know of any shipments from the elevator to Kraver's Distillery?

A. Yes sir.

Q. What kind?

A. Shipped shelled corn to Kraver's distillery.

Q. For that character of service, after this tariff of May 4, went into effect, what did the railroad charge?

A. $4 a car; $2 for the service and $2 for the car.

Q. Is this tariff still in force?

A. Yes sir.

Q. Since May 4, 1908 have they ever charged or demanded a higher charge for that service?

A. No sir.

Cross-examined by Mr. MALCOLM YEAMAN for Def't:

Q. You have read a written contract with A. Waller & Co. to furnish them coal covering the period between July 1, 1908 and June 1, 1909; you state that you furnished them 4326 tons, how much, what proportion of that coal was slack and pea?

A. I don't know, I have not got it separated on my books.

Q. You have got it separated in price have you not?

A. I have not in my memory I should say.

Q. Don't your books show what proportion or what quantity of that was slack and pea?

368 A. Oh, yes.

Q. Can you state what proportion of it was?

A. No sir.

Q. Will you give us such a statement?

A. I can but I can state that the greatest percentage was pea and slack.

Q. I want you to make an accurate statement, but state in your judgment now what proportion was pea and slack?

A. I judge 75 per cent or more was pea and slack.

Q. Did all of that coal come from other mines than the Keystone?

A. Yes sir.

Q. You didn't furnish any of it from the Keystone and didn't apply to the Keystone for any of that kind?

A. No sir; I had no way to get it, the L. & N. refused to furnish cars.

Q. Did you apply to the Keystone to get any of that coal on A. Waller & Company's account?

A. No sir; I did ask the Keystone to help me secure these cars, that I was not able to do it and they ordered cars.

Q. You haven't answered my question?

A. I have answered it as intelligently as I can.

Q. Did you apply to the Keystone for any of the coal that you furnished to A. Waller & Co. and to any of the other industrial plants in the City for the coal that you furnished to them between July 1, 1908 and June 1, 1909?

A. I did not.

Q. You say at least 75% and probably more of the coal you furnished to A. Waller & Company was pea and slack?

A. Yes sir.

Q. I will ask you the same question as to all of the other
369 plants that you furnished coal to; what proportion of it was pea and slack?

A. I would answer it in like manner, at least 75%.

Q. Was not all that you furnished to the Electric Light plant in Henderson pea and slack?

A. No sir.

Q. Part of it was what other kind?

A. Part of it mine run.

Q. I believe you read a written contract with Waller did you not?

A. Yes sir.

Q. You stated that you furnished to A. Waller & Co. 4326 tons from July 1, 1908 to June 1, 1909?

A. Yes sir.

Q. How much did you furnish to them from July 1, 1908 to the middle of May 1909?

A. 3993 tons.

Q. Did you have a contract with the Henderson Elevator?

A. Yes sir.

Q. Have you that contract?

A. I think that contract is filed with Mr. Clay at the time I gave my deposition in this suit.

Q. Have you it with you?

A. No sir.

Q. Do you know where it is?

A. No sir.
Q. Was it in writing?
A. Yes sir.
Q. How much did you deliver to the Henderson Elevator Co. between July 1, 1908 and May 15, 1909?
A. 745 tons.
370 Q. Did you have a contract with the electric light plant?
A. Yes sir; with the City of Henderson for the plant.
Q. How much did you deliver to them between those two dated, that is July 1, 1908 and May 15, 1909?
A. 3504 tons.
Q. Was your contract with the Henderson Chair Factory in writing?
A. Yes sir.
Q. Have you that contract?
A. No sir.
Q. Can you produce it?
A. I don't know whether I can or not.
Q. Who signed the contract?
A. A small man that came here and started the Chair Factory with Mr. Haley.
Q. When was that contract entered into?
A. In May 1908.
Q. Have you looked for it?
A. Yes sir; I think Mr. Clay had it.
Q. When did you look?
A. About three weeks ago.
Q. Tell the jury how much you looked and what effort you made to find it?
A. I went through my desk at home and some papers I had in envelopes marked coal business and it was not in there and I ceased to look for it.
Q. You made no further search?
A. No sir.
Q. What is the name of the man that entered into the contract on behalf of the Chair Factory?
A. The contract was made with Mr. Haley, that is the
371 agreement that I should supply them with their coal?
Q. Who signed the written contract?
A. I don't know whether Mr. Haley or his partner.
Q. What was his partner's name?
A. I don't remember.
Q. When did that man leave Henderson.
A. I don't know sir.
Q. Was the Company a corporation?
A. I don't know sir, whether it was incorporated or not.
Q. How much coal did you deliver to the Chair Factory between July 1, 1908 and May 15, 1909?
A. 216 tons.
Q. Who did you have any agreement or contract with to furnish coal to the Henderson Water Works?
A. Contract was made with the City of Henderson.

Q. Was that in writing?
A. Yes sir.
Q. That is filed here is it not?
A. Yes sir.
Q. Where is the Henderson Water Works?
A. Up in Atkinson Park.
Q. Can you deliver coal to the Henderson Water Works by cars in car load lots?
A. Not to the plant in car loads.
Q. You state that this coal was to be delivered in car loads and on switches——
A. No I beg your pardon.
Q. You said to be delivered in car loads. Has the Henderson Water Works any connection by spur or switch?
A. No sir; the coal is hauled to 12th St. and delivered in wagon loads.
372 Q. Where did you get that coal?
A. I got some of it from Hopkins County and some of it from Union County, Sturgis and Uniontown. Some of it came in on the L. & N. and was switched to the I. C. The I. C. would switch it to 12th Street and it was hauled from there to the Water Works in wagons.
Q. You could not have delivered that coal to the Water Works in car loads?
A. No sir.
Q. That would have been impossible?
A. Yes sir.
Q. Did you get any of the coal that you delivered to the Henderson Water Works of the Keystone?
A. I think in August 1908 after this contract was entered into the L. & N. switched to the Keystone some empty coal cars and they were loaded and switched back to the I. C. and that the I. C. switched them to 12th Street. I think seven or nine cars, something like that was delivered from the Keystone to the Water Works.
Q. That was nine car loads?
A. Seven or nine.
Q. How much was that?
A. About 40 tons to the car.
Q. Did you have a contract with Mr. Jarvis?
A. No sir; I had no contract with Jarvis, just an agreement to furnish him coal during the season at a certain price.
Q. No quantity named?
A. Just the requirements of his factory to keep the steam plant going.
Q. But you had no contract with him?
373 A. No sir.
Q. He was not bound to take any quantity and you were not bound to deliver him any quantity?
A. No specific quantity but he was bound to take enough to keep his plant going.

Q. Does Mr. Jarvis have any switch connection with any railroad?

A. No sir.

Q. You say you had a contract with Delker Bros. where is that, out toward the depot?

A. That is on Green Street.

Q. Did they have any switch connection with any railroad?

A. No sir; coal was delivered to them in wagons.

Q. That was how much?

A. 301 tons.

Q. Delvine, where is he situated?

A. I don't know. At that time he was on Second and Green Streets.

Q. Where was his switch?

A. He didn't have any switch, the coal was delivered in wagons.

Q. The only coal that you delivered to consumers that were on switches was A. Waller & Company and the Henderson Elevator, Electric Light Plant and the Henderson Chair Factory?

A. Yes sir; I think that includes them all.

Q. You said you bought this coal in the open market up at Baskett and down in Union County and Webster and Hopkins Counties and had it brought in on the I. C. R. R. and the L. & N. and L. H. & St. L. Ry.?

A. Yes sir; for a period of time I bought in the open market all the coal I delivered to these people from these places I named.

374 Q. It was bought outside of the City of Henderson and brought in on roads?

A. Yes sir.

Q. What did you pay to the mine; you have been asked what freight you paid and you stated 50 cents a ton, what did you pay for the coal itself, first for the slack?

A. Different prices at different months. For the month of June and July and a part of October I paid 30 cents a ton and some few cars at 25 cents. Beginning with October or some time in October I entered into a contract with the Sunset Coal Co. and the Rose Creek Coal Company whereby I should take a car load of coal a day and buying all the lump and domestic coal that I used from them under that agreement I got my slack at 20 cents.

Q. You got your pea and slack of the Sunset Company at 20 cents a ton?

A. For a certain time in October.

Q. What proportion of the total quantity that you delivered to these four plants did you get from the Sunset mine at 20 cents?

A. I think I got about 2,000 tons from the Sunset mine.

Q. You have your books about all that have you not Mr. Higdon?

A. Yes sir.

Q. Your books show how much you got at 20 cents?

A. Yes sir.

Q. Can you produce those books?

A. Yes sir.

Q. Will you produce them?

A. Yes sir.

Q. And that was at 20 cents a tons?

A. Yes sir.

375 Q. I want a statement from your books of how much coal you bought from the Sunset mine or from anybody else between July 1, 1908, and May 15, 1909 at 20 cents a ton; how much of this coal cost you 25 cents a ton?

A. In the absence of my books it would be hard to make an intelligent statement. I said that during the month of June and up to part of October nearly all of this coal cost me 30 cents and some 25 cents and some in October cost me 20 cents.

Q. I want a statement from you, I'm not trying to repeat the question: How much did your coal cost you per ton between July 1, 1908 and May 15, 1909, the cost price of the coal?

A. (Witness to produce statement following day.)

Q. What was the price that you got for the coal that you furnished to the Henderson Elevator; that is pea and slack?

A. 80 cents a ton.

Q. And what price did you get for that you delivered to the Electric Light plant?

A. I don't remember whether that was 80 or 85 cents.

Q. What was the price you got of the Chair Factory?

A. I think $1.25 per ton. That $1.25 was a wagon delivery and 90 cents car.

Q. The Chair Factory was on a switch?

A. Yes sir.

Q. You were to get 90 cents from the Chair Factory and $1.25 when it was delivered in wagons?

A. Yes sir.

Q. You read a letter from Mr. Powell to you about this matter in which he says, "I think it would be well for you to take this up with either Capt. Howell, G. F. A. Evansville or Mr. D. W. Goodwyn, G. F. A. Louisville, this question of switch coal from the Keystone mine to the various industries, did you ever take the matter up with Capt. Howell or Mr. Goodwyn?

376 A. No sir.

Q. You never made any inquiry of them at all, either verbally or by letter?

A. No sir.

Q. In another letter that you read Mr. Powell says that he would switch the coal for 50 cents a tons, did you ever accept that offer?

A. No sir.

Q. How much pea and slack did you expect or could or would you have gotten under this contract from the Keystone?

Objection by Plaintiff.

Q. What was your understanding as to how much pea and slack you would get from the Keystone under your contract if you could have switched it as you claim you had the right to do?

A. In addition to the pea and slack that the contract calls for I had an agreement with them that I should get all of the factory grades of coal; that is, pea and slack and nut, pea and slack, and in

addition I would take the lump coal that it took to make that pea and slack. In other words, if I would buy lump coal in excess of my contract I was to have all the pea and slack that——

Q. How much pea and slack would you have gotten under that contract, not some other contract, but that contract, that is in furnishing these consumers that you did furnish?

A. I don't know. I could take the contract and figure it.

Q. How much of this 20,000 tons specified in your contract with the Keystone was to be pea and slack?

A. I don't remember, but about 30 per cent of the mine run coal is pea and slack. I think that is the rule. The contract sets out. The contract says, does it not? that 25 per cent was to be pea and slack. I don't know. It has been a long time since I read the contract.

377 Q. Why did you not fill some of these contracts you had with Keystone coal?

A. I filled a part of the contracts with Keystone coal but after the L. & N. refused to switch any more I had no orders.

Q. You filled a part of your contracts with these people with coal that had to be loaded and delivered in wagons, why did you fill that other part of your contract with wagon coal?

A. Because this wagon coal came from cars that was placed at 12 Street to get nearest the Water Works and other places down on the Texas to get nearest Jarvis and Delvin and some other places. It was at least a mile nearer to the point or delivery than the Keystone mine and I had no contract with the Keystone to deliver in wagons. My contract was in car load lots.

Q. And you paid 50 cents a ton on the railroads for the coal you hauled into Henderson?

A. Yes sir.

Q. And then by wagon from the nearest point on the railroad to these other points, to the place of delivery where it was to be used?

A. Yes sir.

Q. When did you first see this tariff that you read here, when did you first have it or have knowledge of it?

A. I don't remember the date, I think some time in June 1908.

Q. Don't you in your deposition say that you had knowledge of this tariff in May 1908, that you read it whilst the contract with the Keystone Company was pending?

A. I don't think that I did. If I did it was an error because the contract with the Keystone was entered into in May but not

378 to begin until July 1st, 1908.

Q. Did you not say in that deposition that you had knowledge of this tariff that was read to the jury in May 1908 whilst the negotiation with the Keystone was pending?

A. Perhaps I did.

Q. I will read from your deposition. Question 88 "When did you get that terminal tariff book that you have filed as exhibit No. 10?" You say, "I think I got that in May 1908. "Q." For what purpose did you procure this?" A. "Mr. Powell told me that he had a new switching tariff superseding the old one that the Henderson Elevator had, that one I was familiar with, and I made application for

one of the new tariffs, and he got it for me. I was a coal dealer and had quite a lot of shipping to do, and had this contract under contemplation." You are speaking there of the contract with the Keystone Mining & Manufacturing Company. That deposition was taken on the 12th day of January 1910, you had, didn't you, a fresher recollection of the dates then than now didn't you?

A. I may have had knowledge of the tariff prior to the time I entered into the contract with the Keystone; perhaps I did, but to fix the date in my mind I can't do it.

Q. You won't say now that your answer given in January 1910 is not correct will you?

A. No sir.

Q. Didn't Mr. Powell notify you on April 16, 1908 that they would not switch this coal for you?

A. No sir.

Q. He did not?

A. No sir.

Q. Do you feel right sure of that?

A. Confidently and absolutely.

379 Q. Didn't he immediately after that one car of coal was switched around to the Electric Light plant, notify you by letter that he would not switch any more coal from the Keystone mine to industries in the City of Henderson?

A. I have no recollection of ever receiving any such letter.

Q. Did he notify you verbally?

A. I have no recollection of it. Which car do you mean he switched?

Q. The one that he switched to the Electric Light plant?

A. He switched three at different times.

Q. In April 1908?

A. No sir; he never notified me that he would not until in June 1908 and they switched three cars in June after the contract was entered into.

Q. Didn't Mr. R. W. Powell, Agent here, come to the Elevator on or about April 16, 1908 and notify you that he would not switch any coal, haul coal from the Keystone mine to any other place about in Henderson here?

A. No sir; he did not.

Redirect examination by Mr. JAS. W. CLAY for Plaintiff:

Q. You said in answer to one of Mr. Yeaman's questions that during a portion of this time you paid 20 cents a ton for this slack coal, I will ask you whether or not in order to get that rate of 20 cents a ton for the slack coal you had to pay a higher rate for a higher grade coal that you were ordering?

A. (No answer.)

Q. In answer to Mr. Yeaman's question on direct examination you stated that during a portion of the time you got a part of this coal, pea and slack, at 20 cents a ton, in order to get that rate of 20 cents per ton, did you have to take other coal of a higher grade along with the pea and slack?

380 Objection by defendant. Overruled. Exception.

A. Yes sir.

Q. Under that contract in order to get that rate you had to pay a higher rate for a higher grade than you were paying under the contract with the Keystone?

A. I didn't have to pay a higher rate but to combine the coal and the freight it cost me more than it would have from the Keystone. The Keystone cost me $1.40 and by shipping it over the L. & N. it cost me $1.50.

Q. Under that contract at 20 cents a ton you had to take a certain quantity of coal?

Objection by defendant. Sustained. Exception.

Q. Could you have gotten Mr. Higdon the lower grade of coal, pea and slack at 20 cents a ton without paying the higher price for a higher grade and without taking the higher grades of coal along with it?

Objection by defendant. Sustained Exception.

Q. I ask you whether you could have gotten that pea and slack at 20 cents a ton without taking the higher grades of coal along with it?

Objection by defendant. Overruled. Exception.

A. I made a contract, my contract with the Sunset and Rose Creek was that I should purchase from them all the domestic coal that I used.

Q. Could you have gotten pea and slack from them unless you had made that contract that you would purchase all of your domestic coal from them?

Objection by defendant. Overruled. Exception.

A. No sir.

Recross-examination by Mr. MALCOLM YEAMAN for def't:

381 Q. Is not that about the same contract you had with the Keystone?

A. No sir; that specified the amounts in the Keystone contract.

Q. That is it says that it is not to exceed 20,000 nor less than 10,000 ton- of all kinds?

A. I think that is the contract. I would rather rely on the contract.

Q. How much of this domestic coal, high grade coal, did you actually take of the Sunset Company from July 1, 1908 to May 15, 1909?

A. The contract with the Rose Creek and Sunset mines didn't begin until October 1908 and just what percentage I used from those two I can't tell but if you will put the question, how much domestic coal I used during the year I could very quickly make the calculation.

Q. How much domestic coal did you use between these dates, that is July 1, 1908 and May 15, 1909?

A. My books show 11,322 steam coal and 14,882 tons of coal. In speaking of steam coal I don't mean it's all pea and slack; there is mine run in there.

Q. That leaves 3560 tons of domestic coal you sold between those two dates?

A. Yes sir.

Witness BEN ROBINSON being called in behalf of the plaintiff and being first duly sworn testified as follows:

Examined by JAS. W. CLAY for pl'ff:

Q. Where were you employed during the months of May and June 1909?

A. At the Keystone mine.

382 Q. In what capacity?

A. I was book-keeper and Clerk.

Q. What time did the Keystone Mining & Manfg. Co. actually cease mining coal?

A. If my memory serves me right, on May 13, 1909.

Q. At the time they ceased mining coal state to the jury whether or not *that* had any coal on hand at the mine?

A. Yes sir; they had. I expect nearly 2000 ton-.

Q. For how long after the mine shut down did they have the coal, how long did they continue delivering coal after they shut down?

A. About the 1st of June.

Q. Up to the 1st of June they had coal to deliver?

A. Yes sir.

Q. That is from May 13, 1908?

A. May 13, 1909. I wasn't there until January 1909.

Cross-examined by Mr. MALCOLM YEAMAN for defendant:

Q. That mine had a tipple for loading coal into cars?

A. Oh, yes sir.

Q. Where was this 2000 tons stored?

A. Right under where the tipple comes; the cars run right across the track and they were just filled up there.

Q. That was coal that was to be loaded into wagons?

A. Into cars too. The mine run was up towards this end and there was the egg coal and nut coal and pea and slack; several chutes there.

Q. What sort of coal was that?

A. Mostly lump.

Q. What proportion of it was slack?

A. I couldn't say. I expect 20 per cent of it was slack and pea together.

383 Q. Was it mixed up as mine run or separated, the pea and slack?

A. Some separated up in the bins but the most of it had just been run out.

Q. Then it was just 200 tons of run of the mines?

A. Pretty near that—you might call it that.
Q. How much pea and slack was there that was separated from the balance of it?
A. I don't know sir, I think there must have been about ten tons.

Redirect ex. by Mr. JAS. W. CLAY for pl'ff:

Q. You say there was about 200 tons there on the ground that had run out of the tipple?
A. Yes sir.
Q. In addition to that was there any coal in the bins?
A. Yes sir; some nut and some egg.
Q. Any pea and slack in there?
A. Yes sir.
Q. Were these bins full at the time the mine shut down?
A. I don't think they were.
Q. Counting what was in the bin- as well as what was on the ground, how much altogether was there on hand when the mine actually ceased mining?
A. Just to make a rough guess I think about 225 or probably 230 tons.
Q. I understood you to say you sold and delivered coal until the 1st of June 1909?
A. Yes sir.

384 Witness R. W. POWELL being called on behalf of the plaintiff and being first duly sworn testified as follows:

Examined by Mr. JAS. W. CLAY for pl'ff:

Q. You are the Agent of the L. & N. Railroad Co. in this City?
A. Yes sir.
Q. Were you such agent from the 1st day of July 1908 to the 1st day of June 1909?
A. Yes sir.
Q. I hand you a book marked "Terminal Tariff of the Louisville & Nashville Railroad Company, I will get you to examine that and state whether or not that is the terminal tariff in existence in the City of Henderson, Kentucky, on the first day of July 1908?
A. Yes sir; that was the tariff in effect on July 1, 1908.
Q. In that tariff is there a sheet relating to the Henderson Terminals?
A. There is.
Q. That sheet was also in effect on that date was it?
A. Yes sir.
Q. Attached to that terminal tariff by clasps which seem to be permanent are several sheets of paper, marked "Statement of local switching at Henderson, Kentucky, from January 1, 1906 to April 30th and inclusive 1910; I will get you to examine that statement and state who prepared it, who had that statement prepared and what it is.
A. That statement was prepared by me and is a statement of local

switching from one industry to another in the City of Henderson during that period, switching done by the L. & N. N. R. R. Co.

385 Q. I will ask you whether or not that switching was done as shown on that statement, was charged for and the charge assessed upon the basis of section 9 of the terminal tariff of Henderson, Kentucky?

A. Yes sir.

Plaintiff here asks that the statement be introduced and the same is here read in evidence and is in words and figures as follows: (See copy referred to attached to last page of this transcript of evidence.)

Q. Turn to page 353 of that tariff and state to the jury whether or not the tariff shows the switching charges at Canton, Georgia?

Objection by Defendant. Sustained. Exception.

Plaintiff offered to prove by the witness the performance of switching service for all classes of freight between the industries in the switching limits at Canton, Ga., and Cynthiana, Ky., at Erie, Tenn., and at Paris, Tennessee and Earlington, Kentucky, at prices ranging from nothing up to $5 per car.

Cross-examined by Mr. M. YEAMAN for defendant:

Q. This statement that you say you made out is headed "Statement of local switching at Henderson, Kentucky, from January 1, 1906 to April 30th inclusive, 1910, and in columns drawn on the statement is shown the consignor of each car and the consignee, the place from which each car was shipped, the place to which each car was shipped, the initials of the car, the contents of the cars, their weight, the switching charges and the date that the service was rendered; I will ask you to state to the jury how many cars of coal were switched during the dates 1906 to 1910?

A. This statement shows that two cars of coal were switched during that time, one April 15, 1908 from the Keystone mine to the City Electric Light plant and one from the Keystone

386 mines to the plant of the Henderson Elevator Company. Only two cars of coal were switched during the period which this statement covers.

Q. How many cars in all were shipped during that period?

A. Two cars. One to the Henderson Elevator and the other to the Electric Light plant.

Q. Were any other cars of coal at all shipped by the L. & N. during the period from 1906 to June, I believe, 1910?

A. No sir.

Q. Will you state to the jury the circumstances under which those two cars of coal were switched?

Objection by plaintiff. Overruled. Exception.

A. The car switched to the plant of the Henderson Elevator was a car that had been placed at the Keystone mine to be loaded for Owensboro and after it was loaded, for some reason, they didn't ship it, or could not, and asked us if we wouldn't switch it to the plant

of the Henderson Elevator, which we did in order to release the car.

Q. It had been loaded to be shipped to Owensboro?

A. Yes sir.

Q. And for some reason they didn't take it in Owensboro?

A. Yes sir.

Q. Then to release the car you did at their request ship it to the Henderson Elevator Company?

A. Yes sir.

Q. State the circumstances under which that one was switched to the Electric Light plant?

A. We were asked by Mr. Higdon as a special favor to handle a car of coal from the Keystone mine to the Electric Light plant and under rule No. 9 and as a personal favor, we handled that car, stating to him at the time that we would not handle any more.

387 Q. You said to him at the time that you would not handle any more that way?

A. Yes sir.

Q. I will ask you whether or not in April 1908, after this car had been switched to the electric light plant you didn't, at the Henderson Elevator, state to Mr. Higdon that you would not switch any more coal from one point in the City to any other point in the City?

A. Yes sir; I did. We talked the matter over several times and I explained to him in each instance that we would not undertake to do that sort of switching.

Redirect ex. by Mr. JAS. W. CLAY for pl'ff:

Q. Are you certain that that car load of coal that was shipped to the electric light plant was shipped as a special favor to Mr. Higdon?

A. Yes sir.

Q. That was not loaded for shipment to Owensboro?

A. No it was the Henderson Elevator car.

Q. I will get you to state whether in your deposition on the former trial of this case you didn't state positively that that car load of coal that was shipped to the Electric light plant was a car of coal that had been loaded at the Keystone for Owensboro?

A. Yes I think I made that statement but it was the Henderson Elevator car.

Q. On that occasion didn't you state that both cars were loaded for shipment to Owensboro?

A. I don't recall that.

Q. I will ask you if on this occasion you were not asked these

388 questions and if you didn't make these answers: "At whose instance did you furnish the car to be loaded with coal at the Keystone Mining Company and switched to the Electric Light plant for account of the Crescent Coal Company prior to July 1st 190-?" A. "That car was furnished on requisition from the Keystone mines for a car to load to Owensboro, Kentucky." Q. "Was that requisition given verbally or in writing?" A. "Verbally." Q.

"By whom was it given? A. I believe Mr. Bosserman, who was Manager of the Keystone mine at that time." Q. "To whom was it given? A. "It was given to my office. I don't know that it was given to me personally, but I do know that after the car was loaded that I was advised personally by the mine people that they could not dispose of it in Owensboro." Q. "You were advised by whom? A. By the mine people." Q. "What mine people? A. The Keystone mine people." Q. "How was that advice given to you by the Keystone Mine People? A. By telephone." Q. "By whom? A. I can't recall just who gave that advice. "Q. To whom was it given? A. It was given to me." Q. "Who directed you then to deliver it to the electric light plant for account of the Crescent Coal Company? A. As well as I can recall the instructions were given, or rather the request was made by both the Crescent people and the Keystone people." Didn't you testify to that effect in your deposition?

A. I think I did.

Q. In answer to Mr. Yeaman's question didn't you make this statement: "Did you at any time switch a car of coal from the Keystone mining plant to the plant of the Henderson Elevator Co. for the account of the Crescent Coal Company? A. Yes sir." Q. "Under what circumstances? A. The car had been furnished the mines on requisition for loading to Owensboro, and after being loaded they advised that they could not make shipment, and
389 to release the car we switched it for Mr. Higdon of the Crescent Coal Company. That service I believe was performed in the first part of April 1908?" You said that did you?

A. Yes sir.

Q. You say that car of coal for the Electric Light plant was not loaded for Owensboro?

A. Yes sir.

Recross-examination by Mr. M. YEAMAN for def't:

Q. You now remember that Mr. Higdon did request you to put this car load of coal to the electric light plant?

A. Yes sir; and I not only remember it but my records bear me out in the statement.

Q. Did you have that record before you when you gave your deposition before?

A. No sir.

Redirect examination by Mr. JAS. W. CLAY for pl'ff:

Q. Had you consulted that record before giving that deposition?

A. No sir.

Q. Didn't you state that you gave that statement in your deposition after refreshing your recollection, after consulting your records?

A. Perhaps I did.

Q. When did you first remember that the car that was delivered at the Electric light plant was not for shipment to Owensboro but was delivered as a special favor to Mr. Higdon?

A. After going over my records and seeing the records.

Q. Had you not done that when you gave your deposition formerly?
A. I don't recall it.

390 Witness LEE ROBINSON being called on behalf of the plaintiff and being first duly sworn testified as follows:

Examined by JAS. W. CLAY for Pl'ff:

Q. Where were you employed in May 1909?
A. For the Keystone mine.
Q. When did you quit work for the Keystone mine?
A. May 15, 1909.
Q. When did the Keystone mine cease to get out coal?
A. That day I think.
Q. At the time when it ceased to get out coal, how much coal was there at the plant already gotten out?
A. I couldn't say exactly; we had the bins full and a big pile under the chute, all that could run down there.
Q. What kind of coal?
A. We had pea and slack, mine run and lump. That on the ground was mostly mine run. We had a bin for the pea and slack. It was separated.
Q. All of that was on hand when it shut down on the 15th of May?
A. Yes sir.
Q. Give the jury your best judgment as to how much there was altogether on the yard
A. I expect 175 or 200 tons.
Q. Where was that?
A. Out on the ground.
Q. Was that in addition to the big pile mentioned?
A. Yes sir; there is a whole lot that has never been hauled away yet.
Q. How much pea and slack in your judgment?
A. I expect 150 tons.
Q. And you say in addition to that there was some in bins and that they were all full?
391 A. Yes sir.
Q. How many bins?
A. Five.
Q. How much would each one of them hold?
A. Four would hold two car loads apiece and the other not so much.

Mr. MALCOLM YEAMAN for defendant:

Q. How much slack separated from the run of the mine?
A. About 150 tons I reckon, somewhere along there.
Q. And where was that?
A. Stacked out in the yard. It was all separated up in the bins We had a screen that had little holes in it and it separated it. There was so much more slack than anything else we piled the slack out in the yard.

Q. How far was that slack stacked from the tipple?
A. I expect 50 or 60 yards off.
Q. How far from the switch or track?
A. Just the tipple between it, say about 50 or 60 feet between it and the tipple.
Q. How would you have gotten that slack into the car?
A. That would have to be loaded in wagons.
Q. How are these bins situated?
A. They have got chutes on either side, one side for loading cars and one side for loading wagons and all we had to do was to pull the rope.
Q. How much slack was in the bins?
A. I expect about 160 or 170 tons of slack. You could get two car loads out of each bin except one. The lump coal bin was not full but it wouldn't hold as much as the other.
Q. That was exclusively slack coal in the bin except this one?
A. No sir; it was all slack in the slack bin but there were five bins. There was different grades of coal in these bins and
392 they were all full and it was all separated up there just as nice as if you picked it out.
Q. How much of that that was in the bin was slack?
A. About 150 tons.
Q. How many bins were full of slack and pea?
A. Two.
Q. And they would hold two car loads each; that would be four car loads?
A. Yes sir.

By agreement of parties defendant at this time introduced the witness Mr. —— COYLE, who having been duly sworn testified as follows:

Examiner by Mr. MALCOLM YEAMAN for def't:

Q. Where do you reside?
A. Madisonville, Kentucky.
Q. What is your business?
A. I am in the coal business.
Q. What is the name of your Company?
A. Sunset Coal Co. or Coyle Coal Company.
Q. Located in Madisonville, Ky.?
A. Yes sir.
Q. Did you have any connection with the Rose Creek Company in 1908?
A. Yes sir; I was manager.
Q. Did Mr. Higdon, doing business in the name of the Crescent Coal Company, purchase any coal of either of the Company-s you have named between July 1, 1908 and May 15, 1909?
A. Yes sir.
Q. Can you state what quantity he purchased, the grade and quality of coal and the price at which it was sold to him?
393 A. He purchased from the Rose Creek mine lump coal mine run, pea and slack. Also the same grades from the

Sunset mines. I don't know the price of the grades he got from the Rose Creek mine, but from the Sunset mine the records show that Mr. Higdon got 103 cars from 1908 to 1909; 53 cars of these were pea and slack; the price 20 cents per ton.

Q. You stated a while ago that he got 103 cars? How many tons to the car?

A. We estimate about 40 tons to the car.

Q. How many tons would that make of pea and slack?

A. 2100 and something of pea and slack from the Sunset mines, forty times 53.

Q. How many tons of pea and slack did he purchase at 20 cents?

A. 2150 from the Sunset mine.

Q. 2150 of the Sunset at 20 cents per ton?

A. Yes sir.

Q. How much from the Rose Creek about?

A. The Rose Creek furnished some more but I am not sure.

Q. More than 2150?

A. I think the two mines furnished Mr. Higdon in the neighborhood of 6000 tons at 20 cents a ton.

Q. That was shipped to him here at Henderson?

A. Yes sir.

Q. You mentioned a third mine?

A. That is a new mine I am now representing.

Q. Did I understand you to say that this 6000 was all pea and slack at 20 cents a ton?

A. Yes sir.

Q. How much of the average output of a mine is in pea and slack?

394 A. From 20 to 25 per cent.

Q. It would vary from 20 to 25 per cent?

A. Coal will vary in percentage of slack. Hard coal don't make as much as soft coal. No. 9 mines from 20 to 25 per cent.

Q. How about No. 11?

A. No. 11 I make 25 per cent slack in the No. 11 mine. I have had no experience in coal working. I have only seen the coal after it was produced.

Q. From your knowledge of seeing it, would there be any material difference between the proportion of the output of pea and slack in Henderson County and in Hopkins County?

A. I think not, the veins I have seen. This Keystone vein I have never seen but the others would make something I think in the neighborhood of the same quantity.

Cross-examination by Mr. JAS. W. CLAY for pl'ff:

Q. I believe you said altogether Mr. Higdon got from the Sunset mine of all grades, 103 car loads?

A. Yes sir.

Q. And of that 53 cars were pea and slack?

A. Yes sir.

Q. Do you know how many cars he got from the other?

A. No sir.

Q. When you gave the estimate at 6000 tons do you mean all grades or just one grade?

A. I mean that the Rose Creek furnished at all times I think as much as the Sunset.

Q. Over what period of time did that contract extend?

A. I don't recall just when, my recollection is sometime between October and December until the following July.

395 Q. Have you the records showing the amount of shipments by the Rose Creek mine?

A. I have not. I am not manager of that mine now.

Q. You are just speaking from your recollection on that point?

A. Yes sir.

Q. The balance of the shipment was of the higher grades of coal?

A. Yes sir.

Q. Mine run and lump coal?

A. Lump and mixed nut and mine run.

Redirect ex. by MALCOLM YEAMAN for defendant:

Q. I understand you to say that all of the coal he got from these two mines was something like 6000 tons and was pea and slack at 20 cents a ton?

A. Yes sir.

Witness Jo HIGDON being recalled on his own behalf and being first duly sworn testified as follows:

Examined by Mr. JAS. W. CLAY for plaintiff:

Q. You told Mr. Yeaman on yesterday that you would go over your books and submit a statement of the total amount of steam coal that you purchased from the Rose Creek and the Sunset mines, they are the two Companies represented by Mr. Coyle, from the date of your contract with them up to the 1st of June 1909; did you prepare that statement from your books last night?

A. Yes sir.

Q. Are you ready to submit that?

A. Yes sir.

Q. State to the jury the total amount of coal you got from the Rose Creek mine from the date of your contract up to the 1st of July 1909?

396 A. The contract ran from October 23, 1908 to October 1909 the following year and the coal that I purchased from the Rose Creek the contract beginning October 23, 1908 up to June 1, 1909, 3494 tons.

Q. During the same period, how much coal did you purchase from the Sunset?

A. 665 tons.

Q. What is the total then from both companies during that period?

A. 4159 tons.

Q. Do your books show to whom the coal was delivered, that 4159 tons?

A. Yes sir.

Q. Of that 4159 tons what proportion was delivered by wagons or to concerns not having switch connection?

A. Of that 4159 tons there was 730 tons hauled from the yard with wagons to various consumers not having switch connection.

Q. The total amount delivered to the concerns that you mentioned yesterday having switch connection?

A. 3429.

Q. Mr. Coyle stated that you got something like 6000 tons from these two companies, state what period that covered?

A. I don't know that I remember what Mr. Coyle said.

Q. What was the total quantity of coal that you bought from these two companies during——

A. The total purchase of steam coal was 7938 tons for the whole year.

Q. In going over your books I will ask you if you found any steam coal between the 1st day of July 1908 and the 1st day of June 1909 delivered to industries having spur connection that you didn't mention yesterday?

397 A. Yes sir.

Q. What were they and how much and to whom was it delivered?

A. One car 42.9 tons to Henry Kraver.

Q. Did his plant have spur connection with the railroad?

A. Yes sir.

Q. To any other?

A. Two cars, 80½ tons to R. A. Powell.

Q. Did he have switch connection with the railroad?

A. Yes sir.

Q. So that is a total of 123 tons in addition to what you mentioned on yesterday?

A. Yes sir.

Recross ex. by Mr. MALCOLM for defendant:

Q. Did you have any contract with Mr. Kraver to furnish him coal in the year 1908?

A. No sir.

Q. Did you have any contract with Mr. Powell to furnish him coal?

A. No sir.

Q. How much of this coal that was delivered to factories having switch connection with the L. & N. did you get from the Sunset, how many tons?

A. I combined the two companies.

Q. Then give me the total amount from both Companies?

A. 3429.

Q. That was slack and pea?

A. Yes sir and nut, pea and slack and perhaps some mine run. Steam coal is what you asked for.

Q. And the total purchase from the Sunset and the Rose Creek mines was how many tons?

A. 7938 tons. I didn't separate it, but I can give you
398 now the sum total of coal purchased from each company. The total number of tons purchased from the Sunset was 2949 and from the Rose Creek 4989.

Q. I also asked you to bring a statement of the quantity of pea and slack delivered to these different industries that you mentioned yesterday; how much pea and slack did you deliver to A. Waller & Company?

A. I don't remember your asking that question. I think I answered that question yesterday,—75 per cent or more of pea and slack.

Q. Can you tell how much pea and slack was delivered to the Henderson Elevator?

A. I delivered the Henderson Elevator 745 tons. I don't remember whether it was all pea and slack or other grades of steam coal.

Q. The Chair Factory, was that pea and slack?

A. Yes sir.

Q. The electric light plant?

A. I would have to answer that question like I did yesterday. I didn't go into that matter.

Q. Was not all of the 3600 and odd tons delivered to the electric light plant pea and slack?

A. No sir; I am pretty sure it was not.

Q. What price did you get for the electric light plant coal?

A. I got 80 cents for the pea and slack.

Q. Didnt you get 85 cents for all the coal you sold them, was it not all 85 cent coal you delivered to them?

A. Perhaps I am mistaken, there are different prices for different grades.

Q. Did you sell anything but pea and slack?

A. Yes sir.

399 Q. What proportion of the 613 tons that you delivered was pea and slack?

A. I can't remember but the greatest quantity was pea and slack. I don't remember your asking me to bring that.

Q. You had no contract with Kraver but you delivered him how many tons in 1908?

A. 42.9 tons.

Q. You had no contract with Mr. Powell but you sold him how much?

A. 80½ tons.

Q. Prior to October 1908 when you commenced buying of the Rose Creek and Sunset mines where did you get your coal?

A. Some from Morganfield and perhaps some from Uniontown, some from Waverly and some from Chesley in Hopkins County. Prior to going into this contract I also bought some from the Rose Creek.

Q. You had an option in January 1908 on 8000 tons of pea and slack and nut, what option was that? Didn't you make a bid to

the City of Henderson in January 1908 for pea and slack and nut and state in that "I believe I can get as much pea and slack as any other man or firm in the City of Henderson. In fact I have an option on eight thousand (8,000) tons of pea and slack and nut, pea and slack to be delivered during coming year, and should my bid on steam coal for the electric light plant be accepted I do not believe it would be necessary to burn mine run at any time. I beg to submit the following: Pea and slack 85 cents per ton, and when pea and slack cannot be had, will furnish nut, pea and slack at $1.20 per ton. Run of mine at $1.50 delivered to Electric Light plant switch.

Trusting that the above bid will prove attractive and that you may see your way clear to award me the contract, I beg to
400 remain,

Yours vary truly, JO. HIGDON.
For Crescent Coal Company."

Objection by plaintiff. Overruled. Exception.

A. Yes sir.

Q. You, of course, expected to make money on that contract at 85 cents a ton?

Objection by plaintiff.

Q. Was your bid accepted?
A. I think so.
Q. You filled the contract?
A. I think so; yes sir.
Q. And you made money on it?
A. A part of it; yes sir.
Q. Did you have an option on 8000 tons of pea and slack?

Objection by plaintiff. Overruled. Exception.

A. Yes sir.
Q. Did you exercise the option and get the coal?
A. I didn't get the coal.
Q. Did you close the option or try to?
A. Tried to; yes sir.
Q. Who was that option with?
A. Kentucky Mining Company.
Q. Where do they do business?
A. At that time at Waverly, Ky.
Q. That's in Union County on the I. C. R. R.?
A. They went out of business that year.

Redirect ex. by Mr. JAS. W. CLAY for pl'ff:

Q. I will ask you if the Kentucky Mining Co. didn't go into bankruptcy and quit business within two months from the
401 date of that letter?

A. Yes sir.

Q. So that you could not get the 8000 tons upon which you had an option?

A. No sir.

Deposition of L. A. BOSSERMAN read on behalf of Plaintiff is as follows:

Interrogatories by JAS. W. CLAY for pl'ff:

Q. Please state your name, residence and occupation?

A. L. A. Bosserman, Expedit, Pa. Book-keeper.

Q. During that period of time and when, if at all, did you reside in the City of Henderson, Ky. and what was your occupation while you lived there? What official position, if any did you hold with the Keystone Mining & Manufacturing Co.?

A. I resided in Henderson, Ky. from October 1, 1907 to February 1, 1909. I was Treasurer of the Keystone Mining & Manufacturing Company.

Q. Are you the same L. A. Bosserman who signed the contracts made between the Crescent Coal Co. of Henderson, Ky. and the Keystone Mining & Manfg. Co. in regard to handling coal in car load lots in the City of Henderson, and which contracts went into effect on the 1st day of July 1908?

A. I am.

Q. Please state whether or not the contracts above mentioned, entered into between the Crescent Coal Co. and the Keystone Mining & Manfg. Co. were made in good faith and with the intention of being fulfilled and carried out by the Keystone Mining & Manfg. Co. or whether they were not intended to be carried out?

A. They were made in good faith with the intention of being carried out.

402 Q. What was the total average daily capacity of the Keystone Mining & Manfg. Co. from the 1st day of July 1908 if the mine had been operated to its capacity?

A. Five hundred tons.

Q. Please state whether or not the Keystone Mining & Manfg. Co. was or was not, ready, willing and able to carry out the terms and conditions of the contracts above mentioned, from and after the 1st day of July 1908?

A. They were ready and willing.

Q. If anything prevented the carrying out of the contracts mentioned between the Crescent Coal Co. and the Keystone Mining & Manfg. Co. state what it was?

A. The failure to procure cars on which to load the coal.

Q. If you shall state that the failure or refusal of the Louisville & Nashville Railroad Company to furnish cars in which to load coal or ship or switch the coal prevented, or had anything to do with preventing the carrying out of these contracts, state how it prevented it, and how you know the Louisville & Nashville Railroad Company refused to furnish cars or to switch or transport them within the switching limits of the City of Henderson.

Objection by defendant. Overruled. Exception.

A. The Railroad Company refused verbally and by letter under date of August 10, 1908 to perform this service.

Q. What effort, if any, did you make after July 1st 1908 to get the Louisville & Nashville Railroad Co. to furnish cars to be loaded

with coal and switched or transported to points inside the switching limits of the City, or to the industrial plants in said City? With whom were such negotiations carried on, and what was the result of these efforts?

403 A. I made efforts verbally and also gave orders by letter to the local agent. All of these were met with an absolute refusal.

Q. If you made any such after July 1st 1908, were they made for the purpose of filling orders given your Company by the Crescent Coal Co. or for other *othersons*?

A. They were made for the purpose of filling orders for the Crescent Coal Company and for others.

(Words "and for others" stricken.)

Q. What answer, or what reply, if any, did you get to such requests, and from whom did you get such answers or replies?

A. I got replies from R. W. Powell, local agent for the L. & N. that they would not perform that service.

Q. During the time you were connected with the Keystone Mining & Manfg. Co. what official position did R. W. Powell hold with the Louisville & Nashville Railroad Co.?

A. Local Freight agent.

Q. If the Louisville & Nashville Railroad Co. had furnished the cars to load coal ordered by the Crescent Coal Co. as the orders for such cars were made, and when loaded had transported or switched them to points in the switching limits having switches connected with the L. & N. road, what would have been the result, so far as the contracts between the Crescent Coal Co. and the Keystone Mining & Manfg. Co. are concerned?

A. They would have been carried out.

Q. In the event it had furnished such cars and transported them would the contract with the Crescent Coal Co. have been carried out, or was there still some other obstacle to the carrying out of such contracts?

Objection by defendant. Overruled. Exception.

A. There was nothing else preventing the carrying out of the contracts.

404 Q. When, if you know, did the Keystone Mining & Manufacturing Co. shut down, or cease operating its mines in the City of Henderson, Ky.?

A. About May 1, 1909.

Q. What, if you know, was the cause of its shutting down its mine?

A. It was done by action of the Board of Directors after my leaving the service of the Company.

Q. State whether or not it would have shut down its mine or stopped mining coal at its plant, if the Louisville & Nashville Railroad Co. had furnished the cars and switched or transported the same, to fill the orders of the Crescent Coal Co.?

Objection by defendant. Sustained. Pl'ff excepts.

Q. State how the refusal of the Louisville & Nashville Railroad Co. to furnish and transport such cars, affected the operation of the mine, or affected its ability to carry out such contracts?

Objection by defendant. Sustained. Plaintiff excepts.

Q. What facilities had the Keystone Mining & Manfg. Co. provided itself with for loading and shipping out coal in car load lots?

A. They had a side-track, having connection with the main line of the L. & N. Railroad Company.

Q. With what railroad track did your switch connect? Did your switch have any physical connection with the tracks of any railroad company other than the Louisville & Nashville Company?

A. We had a connection only with the Louisville & Nashville Railroad Company's tracks.

Q. It is admitted by Mr. R. W. Powell, the local agent of the L. & N. company that a short time prior to July 1st 1908, his
405 company switched two cars of coal from the Keystone Mining & Manfg. Company's plant, one car to the Henderson Elevator Co. and one car to the Electric Light plant. Will you please state what connection if any, you or the Keystone Company had with the placing of these empty cars on the Keystone switch?

A. We made requisition for them.

Q. Who if you know, ordered, or made requisition on the railroad company for these two cars?

A. We did.

Q. State whether or not the Keystone Mining & Manfg. Co. ordered these two cars from the railroad company under the representation that they were to be loaded with coal for shipment to Owensboro, Kentucky, or any other place outside of Henderson Ky.?

A. They did not.

Q. State whether or not, after the two cars mentioned had been loaded the Keystone Mining & Manfg. Co. represented to the Louisville & Nashville Railroad Co. that the order from Owensborro for the coal had been cancelled, and requested on that account in order to free the cars of their loads, that they be switched to the Henderson Elevator or the Electric Light plant to be unloaded?

A. They did not.

Q. State if you know, the purpose for which the two cars named were placed at the Keystone mine?

A. To be loaded with coal and to be shipped to the industrial plants named.

Q. Who notified the Keystone Mining & Manfg. Co. of the placement of these two cars? When did you first learn of their placement or proposed placement at the mine? How long after they or either of them were placed, before they were loaded? How long did they remain loaded before they were switched out by the railroad company?

406 A. I made requisition. They were placed in a few days. Loaded at once and switched out by the Railroad Company within a few days.

Q. State whether or not the Louisville & Nashville Railroad Com-

pany, before these cars were placed or loaded, knew the purpose for which they were being placed, and what was going to be done with coal after it was loaded into the cars?

A. I am unable to state.

Q. Please detail all the facts known to you, in connection with the sale by the Keystone Mining & Manfg. Co. of these two cars of coal, who they were sold to, and the whole transaction so far as known to you from the time the sales were made up to the time the cars were switched out by the railroad company?

A. I have already answered this in the foregoing answers to the foregoing interrogatories.

Cross-interrogatories by Mr. MALCOLM YEAMAN for defendant:

Q. Why was the contract of which you speak in answer to the 4th interrogatory in chief entered into by means of a proposition from "Messrs. Clay & Clay, Agents and Attorneys" instead of directly with the Crescent Coal Company, or Jo Higdon? Did you not know when the proposition of Clay & Clay was made that they were acting for the Crescent Coal Company, and that they (Clay & Clay) were not engaged in or interested in the coal business?

A. I knew Clay & Clay as agents and attorneys and not until we met to sign contracts already submitted did I know, whom their client was.

Q. When did the Keystone Mining & Manufacturing Company commence to mine coal for sale? When did the mine cease mining coal for sale? How many tons per day on the average, between the time it commenced mining and the time it ceased, did the mine actually take out? I do not ask as to capacity, but as to actual results. Has it ever resumed operations since it shut down? When did you leave Henderson? Had the mine resumed operations when you left?

407

A. In the early part of 1906 and ceased mining coal in April 1909. They mined between fifty and two hundred tons per day being all that they could dispose of. It has not resumed operations since shutting down. I left Henderson, Ky. in February 1909. It had not yet ceased operation when I left.

Q. How deep is the shaft of the Keystone mine? Through how many veins of coal does it pass? Which vein was operated while the mine was operated? How far is that vein below the surface? What is the character of the roof of that vein? Is it a good roof or a bad roof?

A. The shaft is 457 feet deep. It passes through two veins of coal. Both No. 9 and No. 11 veins were operated. The former being 151 feet, the latter 457 feet from the surface. The roof in both veins is of slate and of fair condition.

Q. What quantity of coal, how many tons per day, did the Keystone Mining & Manfg. Company actually mine and ship to points out of and beyond Henderson while you were with that Company? What quantity did that Company actually mine and sell to con-

sumers within the City of Henderson? How was the coal that was sold to consumers in Henderson delivered, by wagons or otherwise?

A. The Keystone Mining & Manfg. Co. shipped very little coal to points beyond Henderson. Possibly five cars in one month. They sold from fifty to one hundred and seventy-five tons per day within the City. This was delivered by wagons.

Q. Did the Louisville & Nashville Railroad Company ever decline or fail to furnish cars to and at the Keystone mine to be loaded with coal for shipment to points outside of and beyond the City of Henderson? If so, when and by whom was the request made to furnish such cars?

Objection by plaintiff. Sustained. Exception.

408 Q. State as near as you can, and give your best opinion as to what amount of capital was invested in the plant of the Keystone Mining & Manfg. Co. prior to the making of the contract with Higdon or Crescent Coal Company of July 1, 1908, and what amount of capital was put into said plant after the making of said contract? Was the shaft sunk and the mine in operation at the time that contract was made?

A. The Keystone Mining & Manfg Co. invested about Two Hundred and twenty-thousand dollars prior to July 1, 1908 and about twenty thousand dollars after that date. The shaft was sunk and mine in operation when contract with the Crescent Coal Company was made.

Q. With whom did the Keystone Mining & Manfg. Company have contracts for coal besides Higdon or the Crescent Coal Company? Who else and in what quantity, did the Keystone Company ever sell or contract any coal to in car load lots?

A. Only with a few local consumers. We sold coal to the Diamond Coal Mining Co. and to a Distilling Company in Owensboro, but had no contracts for the same.

Q. Did the Keystone Mining & Manfg. Company cease operations because the Crescent Coal Company or Higdon could not or did not carry out the contract effective July 1, 1908? or because the Louisville & Nashville Railroad Company failed to furnish cars and transport the coal of the Keystone Company to the different industrial plants within the City of Henderson?

A. Both of these questions had considerable bearing on the shutting down of the Keystone Company's mines.

Q. Was the Keystone Mining & Manfg. Company's enterprise entered upon the shaft sunk and its capital invested with the view of having the coal it contemplated mining hauled in cars, in-
409 stead of in wagons and carts, from its mine to the different industrial plants in the City of Henderson having connection by switches with the track of the Louisville & Nashville Railroad Company? And did the Keystone Company cease operations because the L. & N. R. R. Company would not furnish cars for such service?

A. I understood they contemplated having their coal hauled in cars. This had much to do with the Keystone Co. shutting down its mine.

Q. Is it not a fact that before the Keystone Mining & Manfg. Co. had commenced to sink its shaft, Mr. Nicholson then in charge of its affairs, went to the traffic Manager or other official of the Louisville & Nashville Railroad Company and asked, in substance, what arrangements could be made to have the L. & N. R. R. Company to transport its coal to the industrial plants in the City of Henderson, and that he was told, in substance, that no such arrangement could be made, that the L. & N. R. R. Company did not engage in transporting coal or other property from one point in a city to another point in the same city?

A. I know of no arrangements made between Mr. Nichols and any of the officials of the Louisville & Nashville Railroad Company.

It is here agreed between the parties that Mr. R. W. Powell if asked would state that the Keystone Mining & Manfg. Co. is inside of the switching limits of the City of Henderson and within the corporate limits of the City of Henderson.

Witness Jo Higdon is recalled.

Q. Examined by Mr. Clay for Pl'ff:

Q. I will get you to state to the jury just the general plan of operation or the general territory covered by the Belt Line of the L. & N., its switches and connection; where does it start and where does it end?

410 A. I understand the Belt Line intersects the main line of the L. & N. beyond the Keystone Mining plant and runs across town to Marshall & Alves, the City Mills and the Tobacco extract Works.

Q. The Belt Line connects with the main line of the Company at what point?

A. Beyond the Keystone Mining Company's plant.

Q. Then the main line runs down how far before connecting with the Belt Line?

A. I don't know just how far beyond the Keystone Mining & Manfg. Company.

Q. It intersects the main line?

A. Yes sir.

Q. This main line runs down toward the river and toward Fourth Street how far?

A. It runs across the bridge.

Q. I will ask you whether or not there is another belt line or spur connection with the main mine running parallel with the wall on Fourth Street toward the river?

A. Yes sir; there is a spur track that runs to the wharf-boat.

Q. I will ask you whether or not connecting with these various tracks there are switches and spur tracks leading to industries in the City?

A. Yes sir.

Q. So that the Belt Line or Terminal facilities of the railroad company embrace a track beginning at the river in Fourth St. and

running down Fourth St. to the main line, then with the main line to a point somewhere beyond the Keystone Mining & Manfg. Co. plant and from the main line of Audubon Street?

411 A. Yes sir.

Recross-ex. by Mr. MALCOLM YEAMAN for Defendant:

Q. Where is the Peoples Coal Mine located?
A. It's in Weaverton.
Q. Where is Mr. Nicholson's mine located?
A. In Henderson near the Fair Grounds.
Q. Where is the Henderson Mining & Manfg. Co. plant located?
A. On Second St. beyond the I. C. and L. & N. railroads.
Q. None of these mines have connection by switch or spur with any railroad have they?
A. The Henderson Mining & Manfg. Co. has not but I don't know whether the Peoples Mines has any connection or not.
Q. All these mines deliver coal by wagons do they not?
A. The Henderson Mining & Manfg. Co. is not in operation.
Q. In 1908 was it in operation?
A. I don't remember; I think not.
Q. If it was it delivered it- coal by wagons?
A. Yes sir.
Q. Are there any other mines in the City of Henderson except these three and the Keystone mines?
A. I think not.
Q. How many coal agents are there in the City of Henderson, persons who sell coal?

Objection by plaintiff. Overruled. Exception.

A. I don't remember. Mr. R. A. Powell, Mr. Conway, Marshall & Alves, Crescent Coal Co., Mrs. Shelby and Walter Wilson.
Q. All of those deliver by wagons?
A. Yes, all of those I mention deliver in car load lots.
Q. But they all deliver by wagons also?
A. Yes sir.

Mr. JAS. W. CLAY for Pl'ff:

412 Q. The Crescent Coal Company also delivers by wagon does it not?
A. Yes sir.

Plaintiff rests.

Defendant then introduced its evidence as follows:

Defendant then read the affidavit as to what the witness JUDSON A. WILSON would state if present, which is as follows:

"By said Wilson defendant can prove that in the years 1908 and 1909 he was the President and chief officer of the Henderson Chair Factory, a corporation then doing business in the City of Henderson, Ky. and that in neither of said years the said Chair Factory had any

contract, agreement or arrangement with the plaintiff to furnish any coal to said Chair Factory. The facts defendant can prove by said Wilson are true".

Witness R. A. POWELL being called on behalf of the defendant and being first duly sworn testified as follows:

Examined by Mr. MALCOLM YEAMAN for def't:

Q. How long have you been in business in the City of Henderson?
A. About 18 or 20 years.
Q. In what business?
A. Coal business.
Q. How do you deliver your coal to your customers in Henderson.

Objection by Plaintiff. Asks to have the answer excluded.

A. By wagons.
Q. To what extent have you been engaged in the coal business during that time, give some idea of the extent of it?
A. I suppose I handle from 3 to 5 car loads a day.
413 Q. And you deliver that coal by wagons?
A. Not all of it.
Q. What proportion of it do you deliver by wagon?

Objection by Plaintiff. Overruled. Exception.

A. Little over half of it I expect.
Q. State to the Court and jury what it would have cost in Henderson to deliver coal to the different industrial plants in Henderson having physical connection with railroads by means of wagon and team per ton from the Keystone Mining & Manufacturing Company?

Objection by Plaintiff. Sustained. Exception.
Defendant avows that the witness if permitted to answer the question would state that coal could have been delivered from the Keystone Mining & Man'f'g Company's mine in Henderson, Ky. in the years 1908 and 1909 to any of the industrial plants in the City of Henderson having connection by switch or spur with any of the railroads in Henderson by wagon and team at a cost of not exceeding 30 cents per ton.

Cross-examination by Mr. JAS. W. CLAY for pl'ff:

Q. You represent the St. Bernard Mining Co. at Earlington?
A. Yes sir.
Q. Handle its coal in your yards?
A. Yes sir.
Q. You say you deliver about half of your coal by wagons and about——
A. I expect more than half of it.
Q. The coal that you deliver by wagons is domestic coal and industrial coal not having switch connection?

A. Yes sir. Or if I should happen not to have a car and they are running pretty close I run it into wagons.

Mr. M. YEAMAN for def't:

Q. Are there any industrial plants in the City of Henderson where coal cannot be delivered by wagons into the bins provided by the industrial plants for its storage?

414 A. None that I know of.

Q. From your knowledge of the coal business and experience in it, what is the average proportion of pea and slack to the total output of coal mine in these mines in this locality?

A. About twenty per cent.

Q. About twenty per cent of the total output is pea and slack?

A. Yes sir.

Recross-ex. by Mr. JAS. W. CLAY for Pl'ff:

Q. That twenty per cent does not include, nut, pea and slack and mine run and the higher grades of steam coal does it?

A. That twenty per cent is pea and slack strictly.

Q. Do you know what per cent of the Keystone output is pea and slack?

A. No sir.

Q. When you made mention of the twenty per cent that is Hopkins County Coal is it not?

A. Yes sir.

Q. You don't know anything about coal mines in this County?

A. No sir.

Mr. MALCOLM YEAMAN for defendant:

Q. Is not the coal harder here than in Hopkins County?

A. I think so.

Q. Don't hard coal produce a less per cent of pea and slack than solft coal?

A. Yes sir.

Defendant here stated that it could prove by two other witnesses now present in Court the same facts in reference to the cost of deliver- coal by wagon and team in Henderson, that he has already avowed he could prove by the witness R. W. Powell but the plaintiff objected and excepted to the introduction of such evidence, which objection was sustained by the Court and to which ruling of the Court the defendant objected and excepted.

415 Witness L. P. HITE being called on behalf of the defendant and being first duly sworn testified as follows:

Examined by Mr. MALCOLM YEAMAN for defendant:

Q. You live in the City of Henderson?

A. Yes sir.

Q. Did you live here in 1908?

A. Yes sir.

Q. You are in charge of the electric light plant for the City of Henderson?

A. Yes sir.

Q. And were in charge in 1908?

A. Yes sir.

Q. In 1908 did you buy any coal for the electric light plant of the plaintiff Jo Higdon?

A. The coal was bought through a contract made by the City Council.

Q. And coal was delivered to the electric light plant of which you then had charge under that contract made by Mr. Higdon with the City?

A. Yes sir.

Q. What grade or quality of coal was that?

A. The principal part of it was pea and slack.

Q. What proportion of it was pea and slack?

A. I couldn't give you the figures, just in the number of tons.

Q. Just give your judgment as to the proportion?

A. We got something — 3200 tons in the nine months that we bought coal from him and out of that I think about 40 tons was mine run, 150 nut, pea and slack and the balance was pea and slack.

Q. Then with the exception of 40 tons and 159 tons it was all pea and slack?

A. Yes sir.

416 Q. How much coal in all did Mr. Higdon deliver to the electric light plant between July 1, 1908 and May 15, 1909?

A. He delivered, including all of May, 3343 tons. In the month of May we got 252 tons.

Q. What proportion of that would come in for the last half of May, that is between the 15th and 30th?

A. I should say one-half, 126 tons.

Q. Then that would make 3218 tons that Mr. Higdon delivered to you at the electric light plant between July 1, 1908 and the 15th of May 1909?

A. Yes sir.

Cross-examined by JAS. W. CLAY for pl'ff:

Q. Does the amount you have given include all grades of coal, pea and slack and nut, pea and slack and mine run?

A. Yes sir.

Q. In giving these figures you give the figures of the coal actually paid for do you not, by the City?

A. There may be a slight difference in the records. We have the weights as actually received and there have been, in one or two cases, some deductions made.

Q. Describe just what they were?

A. I remember one car of very poor coal we deducted a half cent on the price, but I think this does include the amount of coal we used. In order to keep the records straight we put down the quantity of coal to show what it takes to produce a certain amount of electricity.

Witness M. M. MOSER being called on behalf of the defendant and being first duly sworn testified as follows:

Examined by Mr. MALCOLM YEAMAN for defendant:

Q. You live in the City of Henderson?

417 A. Yes sir.

Q. What is your business?

A. Manager of the Peoples Coal mines.

Q. Were you manager at the Keystone mines in 1908?

A. I was book-keeper at the Peoples Mines in 1908.

Q. How long have you been manager of the Peoples mines?

A. Two years.

Q. Did you ever have any connection with the Keystone mines?

A. No sir.

Q. From your knowledge of the coal business and experience in it, what proportion of it, that is the output of the mine in this locality is pea and slack?

A. About 25 per cent where they shoot on the solid in the mines around here.

Q. Where they shoot on the solid, explain what you mean by that?

A. We mean by that just simply drilling a hole and shooting without undermining the coal.

Q. No picking of it?

A. No sir.

Q. Has the Peoples Mines any connection by switch or spur with any railroad?

A. No sir; no switch.

Q. You deliver by wagons?

A. Yes sir.

Q. Your principal market is the City of Henderson?

A. Entirely, and around in the country.

Q. What other mines is there now in operation in the City of Henderson?

A. J. L. Nicholson.

418 Q. Has his mine any connection by switch or spur with any railroad?

A. No sir.

Q. His deliveries are all by wagon?

A. Yes sir.

Q. His market is local here?

A. Yes sir.

Q. Did the Henderson Mining & Man'f'g Co. mine in 1908 have any connection by switch or spur with any railroad?

A. Not the Henderson Mining & Man'f'g Company.

Q. Its deliveries were altogether by wagons?

A. They were not doing business.

Q. They had been for a long time?

A. I understood so; yes sir.

Cross-examined by JAS. W. CLAY for pl'ff:

Q. The Henderson Mining & Man'f'g had not been doing any business for several years prior to the time the Keystone commenced operation had it?

A. I think not. That is before I came here.

Q. I don't know that I caught your definition of shooting on the solid?

A. Shooting on the solid, the coal is not undermined; just simply a hole drilled in the solid and shot, which tears more coal out and therefore makes more slack than mining coal.

Witness BEN ROBINSON is called on behalf of defendant.

Examined by Mr. MALCOLM YEAMAN for defendant:

Q. You testified yesterday?

A. Yes sir.

Q. What proportion of the coal mined at your mines and other coal mines in this locality is of pea and slack?

A. I figure it 20 or 25 per cent, along there. We had
419 three grades, nut, lump and egg.

Q. And you estimate 25 per cent of the total output was pea and slack.

A. Yes sir.

Examined by JAS. W. CLAY for pl'ff:

Q. Where you don't make pea and nut coal then the per cent of pea and slack would be greater?

A. Yes sir.

Defendant here read the deposition of C. B. COMPTON on its own behalf which is in words and figures as follows:

Q. Mr. Compton what position do you hold with the Louisville & Nashville Railroad Company?

A. I hold the position of Traffic Manager of the Louisville & Nashville Railroad Company.

Q. As Traffic Manager of the Louisville & Nashville Railroad Company, is it your duty to fix the rate on shipments of traffic over the system and between all points on the system?

A. Yes sir; added by the Central Freight Agents, reporting to the office of the Traffic Manager. All rates which they make are subject to the approval of the Traffic Manager. Rates cannot be made effective according to our organization without the approval of the Traffic Manager.

Q. Did the Louisville & Nashville Railroad Company ever put in a rate at Henderson for the shipment of coal in car load lots or otherwise from the mining plant of the Keystone Mining & Manufacturing Company to industrial plants within the switching limits of Henderson?

A. No sir, the Louisville & Nashville Railroad Company has never established a rate for the transportation of coal from the mines of

the Keystone Mining & Manufacturing Company to any
420 point in the City of Henderson, whether it be to an industrial plant or a team track or any other delivery. About five years ago when the question come up, with regard to the development of coal on the property now operated as a coal mine a Mr. Nicholson came to see me at Louisville and asked the question what rate or what arrangement are you willing to make for the movement of coal by car from the proposed opening of the coal mine to points in the City of Henderson, and I told him we were not engaged in the movement of property in competition with teams or the driving of live-stock, and that we could not consistently make him any rate whatever, and that he could not depend upon the railroad company providing such service.

Q. Was that conversation had with Mr. Nicholson prior to putting in of the side track at the plant of the Keystone Mining & Manufacturing Company?

A. Yes sir.

Q. And Mr. Nicholson was then the manager or an official of the Keystone Mining & Man'f'g Company?

A. Yes sir; he represented the owners of the property and was interested himself according to my information. He was the expert selected to develop the property.

Q. Mr. Compton, Mr. Howell of Evansville authorized or undertook to authorize Mr. Powell, the Agent of the Company at Henderson to offer to make to the Crescent Coal Company or to the Keystone Mining & Manufacturing Company a rate of fifty cents a ton for the transportation of coal from the mine of the Keystone Mining & Manfg. Company to industrial plants in the City of Henderson. Was that rate submitted to you prior to the attempt on the part of Mr. Howell to authorize the putting in of the rate?

A. No sir; when my attention was called to that matter I expressed surprise that he would undertake to advise the Agent at Henderson that he might quote a rate of fifty cents per ton.
421 The rate was never established. It never became effective. It was simply a tentative offer. When it came to my attention I ordered and gave instructions that the rate should not be established; that I had already advised Mr. Nicholson and the people who owned the property of the Keystone Company that we would not engage in that character of business.

Q. What is a switching service Mr. Compton?

Objection by Plaintiff. Sustained. Exception.

A. (Said answer is as follows): A switching service is an auxiliary service to transportation service. Transportation service is better explained by illustration. If a shipment say should move from Nashville, Tennessee to Henderson, Ky. consigned to a consignee having an industry on the railroad track, and it was served by that track, the service from Nashville, Tenn. to Henderson, Ky. would be transportation, and the switching from the yards or the tracks of the railroad to the industry would be switching, and that is auxiliary to the transportation service. It would be the same if the business moved in the opposite direction. It would be the same

if the industry was located on some other line. A movement between two points within the limits of a city is not switching.

Q. Switching service then either precedes or succeeds a transportation service?

A. Yes sir.

Q. The movement of freight from the mine of the Keystone Mining & Manfg. Co., to an industrial plant within the switching limits of the City of Henderson would be what kind of service?

A. It would be transportation service if we engaged in it.

Q. Has the Company ever engaged in that service?

A. No sir.

Q. Has it ever held itself out as engaging in that service?

422 A. No sir.

Q. Has the Company ever switched for Marshall & Alves and for the Henderson Elevator Company, for A. Waller & Company and other grain elevator or milling companies in Henderson, grain between the River track and those plants, or between the elevators and the mills, and if so why is the company engaged in that service, and what kind of service is it?

A. The Louisville & Nashville Railroad Company has at Henderson I think, and other Ohio River crossings endeavored to upbuild the grain and milling interests. It has by milling in transit arrangement at Henderson undertaken on grain from the territory north of the River to arrange for milling in transit and re-shipping at through rates from the north bank of the Ohio River. It has likewise undertaken to provide facilities at Henderson whereby grain may move from the Ohio River landing and its tributaries, and bring the grain from its river facilities to the elevators in the City of Henderson, from which it is re-shipped to the south in the shape of grain, and it has undertaken to move such business to the mills at Henderson, there to be converted into mill products and reshipped to the south. It has likewise moved grain from an elevator to the mill as an auxiliary to the transportation from the mill to the south in the shape of mill product. Such business as has moved in the shape of grain or grain products or other products which may be converted into mill products has been done as an auxiliary to the through shipment, under milling in transit arrangement.

Q. Is the milling in transit arrangement such as exists at Henderson authorized by the tariff of the Louisville & Nashville Railroad Company?

423 A. Yes sir.

Q. Does that arrangement apply to the Peerless Distillery Company in the movement of grain to that Company to be converted into products of that company, to be shipped outside the city of Henderson?

A. The Louisville & Nashville Railroad has tried to encourage the manufacture of grain products, and that it is a grain product. This was handled under the same arrangement as the arrangement for the milling of food stuffs.

Q. If sand or other product or rock are shipped in to Henderson to a dealer in those products, and the car is ordered by the dealer

to be placed at some industrial plant in the city of Henderson, is that a movement authorized under our *traffic*, and is the switching of the car from the concern or in placing the sand or rock an auxiliary movement to the transportation to that place?

A. I assume that you refer to a shipment to the city of Henderson by the Louisville & Nashville Railroad of a carload of some commodity. The Louisville & Nashville Railroad would place that car at the Henderson rate at any point in the City of Henderson that it reached with its own rails. The movement from the break-up yeard to the delivery track would be the switching movement, or an auxiliary, to the transportation service, and likewise it would be an auxiliary to the transportation service if it was delivered on the Illinois Central Track or on some other track.

Q. Does the milling in transit principle apply to any other raw material such as logs that are to be cut into lumber &c.?

A. We have no arrangement of that sort at Henderson. There are arrangements like this: where after the timber has been cut either in Kentucky, Tennessee or in other southern states, it has to be cut over, and it is not in such quantities as to justify the location of a saw mill to cut it, the railroad has encouraged the movement of the logs into the saw mill, and under through arrangements for the purpose of gathering up the scattered timber and having
424 it converted into merchantable condition and disposed of under an arrangement whereby the through rate is undertaken to be protected as near as it is possible to do so. All such arrangements of that sort are on file with the various commissions of the states through which the Louisville & Nashville Railroad Co. traverses, and also with the Interstate Commerce Commission, and they are in a measure like the milling in transit of grain.

Q. On page 133 of the Terminal Tariff of the Louisville & Nashville Railroad Company issued April 1st, 1908 Rates, Rules and Regulations governing switching of cars at Hopkinsville, Kentucky are set out. I wish you would examine that Mr. Compton and state what switching arrangements are authorized under that publication?

A. This tariff authorizes the placement of a car received at Hopkinsville by the Louisville & Nashville Railroad Company to the industrial sidings, likewise it authorizes the movement from the industrial sidings to the railroad for movement from Hopkinsville to its shipped destination. It authorizes upon the request of the shipper or consignee cars arriving at Hopkinsville by the L. & N. to be placed upon switches tracks, warehouses or industries reached by or connected with the tracks of the Louisville & Nashville Railroad Company or portage railroad, and such placement and delivery shall constitute delivery of freight to the consignee.

Q. The tariff that you refer to is not in effect?

A. It has been superseded by I. C. C. ± A-9938 March 27, 1910, issued February 21, 1910, and contains this clause: (Plaintiff objects to the clause of the tariff of 1910.) "The Louisville & Nashville Railroad does not engage in the business of local switching between switches, tracks, warehouses and industries in Hopkinsville, Kentucky Terminals, but where such service is performed as an ac-

commodation a charge of $2.00 per car switching plus $4.00 per car for rental shall be assessed, except as shown below." The
425 exception in this case is identical to the exception in the original, and it refers to the movement of stone from the Dalton Stone Company, of car loads of stone and screenings to the tracks of the Louisville & Nashville Railroad Company in Hopkinsville at a charge of $3.00 per car. That rate is issued for the purpose of taking care of the stone used by the municipality of Hopkinsville, Kentucky, in making their streets and roads.

Q. Is that service performed for any other purpose except that the rock may be used on the streets of the municipality of Hopkinsville?

A. That is my understanding.

Q. Does the Company do that kind of service for municipalities and for the public at times?

A. The railroad has for years encouraged the building of good roads, and has shown a great deal of interest in the building of good roads in the territory that it traverses, and has always been willing to make reduced rates for the betterment of the county and state roads. It has received thanks often from the various states for liberality in that respect, lately from the State- of Illinois and Virginia.

Q. Under this tariff with the exception of the service performed in switching cars of stone in the City of Hopkinsville to be used in building streets, did the Louisville & Nashville Railroad Company engage in any switching in the City of Hopkinsville, except as an auxiliary to the transportation service?

A. This is not a switching arrangement at all. This is a transportation charge. We transport the property at $3 a car. We don't switch it for anybody.

Q. Did the Company at the time this tariff was in effect, the first tariff that I referred to, the tariff effective April 1st., 1908, perform any switching service in the City of Hopkinsville, and had
426 it the right under that tariff to perform any switching service in the City of Hopkinsville except as an auxiliary to the transportation service?

A. No sir; it did not sir.

Q. I will get you to refer to page 353 of the Terminal Tariff which was filed with the deposition of Mr. Higdon as exhibit J. H. No. 10 and explain what if any service the Louisville & Nashville Railroad Company performed at Canton, Georgia.

A. At Canton, Georgia there is located a large marble quarries and sawing plants where marble is shaped up for shipment to various points in the United States. Canton, Georgia is a small town of no importance other than that developed through the mining and manufacturing of Georgia marble. The marble is moved to the saw-works and shaping-up plants, as an auxiliary to the through movement to destination, wherever the property is sold. The movement in respect to the marble at Canton is the same as the movement at Henderson with respect to grain from the Ohio River to the milling plants.

Q. Please refer on that page to the Cynthiana arrangement or tariff and explain that?

A. Cynthiana Kentucky tariff rates, page 353. "All classes of freight between the depot of the Louisville & Nashville Railroad and all industries having private sidings within the switching limits $1.50 per car." Industries at Cynthiana, Ky. are served by side-tracks or switches connected with the Louisville & Nashville Railroad. Cynthiana is a local station on the Kentucky Division of the Louisville & Nashville Railroad and no business moves inward or outward at that point except by the Louisville & Nashville Railroad. $1.50 per car is an auxiliary charge to the transportation service on inward and outward business, and is in addition to the charge for the transportation.

Q. Does that tariff authorize, or has the Louisville &
427 Nashville Railroad engaged at any time in moving cars between two industrial plants in the City of Cynthiana where there was to be no outward or no transportation movement to it?

A. No sir there has been no movement between any two industries in the City of Cynthiana.

Q. Refer on the same page to Cotula, Tennessee.

A. Cotula, Tenn., is located on the new line of railroad constructed from Saxton, Tenn., to Knoxville, Tennessee, in what is called the Narrows of the Cumberland Mountains. The Narrows is a mountainous gorge through which the Clear Fork of the Cumberland River passes, and it is so rocky and rough that it was almost impossible to penetrate it with a railroad. The coal in that section lies rather high in the hills or mountains. Dr. Catliff of Williamsburg, Ky. developed a coal mine at a place called Catliff. The name is Cotula. It is a gorge in the mountain. The mine tipple is not at the village or the mining camp. The tipple is inaccessible by any means of transportation whatever for the movement of coal from the tipple to the mining camp to keep the miners warm, and in order that this property might be successfully operated the Railroad Company did, for a transportation service charge $5 per car for moving the coal from the tipple to the mining camp; otherwise they would not have had any coal to use. That was to my mind a justifying reason for the establishment of a transportation charge of $5.00 per car, which was from the coal company's property to the coal company's property for the purposes named.

Q. Please refer to page 237 of the same tariff and explain the service the Louisville & Nashville Railroad performs at the City of New Orleans?

A. Page 237 of the Terminal Tariff of the Louisville & Nashville Railroad shows the rate and charges per car between location on the
Louisville & Nashville Railroad in its New Orleans terminals,
428 and between the L. & N. terminals and indicated connecting line junctions. It provides that "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks and warehouses or industries in its terminals, but where such service is performed as an accommodation the charges specified shall be assessed." In the first section showing the origin of the property the name L. & N. wharf, head of Caliope

Street is used. That is the wharf on the Mississippi River at the foot of Caliope or Julia Street, and business arriving at New Orleans by fresh water rivers or by sea and river is deposited at that wharf and moved to the industry on the L. & N. track just the same as the property is moved from the wharf boat at Henderson to the industry in the City of Henderson. The conditions surrounding the handling of property at New Orleans is identical to that at Henderson.

Q. Does the Louisville & Nashville Railroad Company now engage or has it ever engaged in the business of transporting carloads of product from one industrial plant in the City of New Orleans to another industrial plant in the city of New Orleans when the same is not an auxiliary movement to a transportation service?

A. No sir.

Q. I will get you to refer to page 257 of the same tariff showing the charges at South Paris, Ky. and explain what that tariff authorizes?

A. Page 257 *of* the Terminal Tariff of the Louisville & Nashville Railroad applicable at Paris, Ky. provides that the rates apply as per note 1 to and from certain industries, which I do not understand is questioned; but the tariff rate applies inward and outward. No. *No.* 2 says "A charge of $2 per car will be made for switching cars between C. S. Brent & Bros. warehouse, South Paris, and E. F. Spear & Sons Hemp House and the freight depot of the
429 Louisville & Nashville Railroad, and $5.00 per car between R. B. Hutcheraft and the Louisville & Nashville freight depot." It does not say that switching will be performed between C. S. Brent & Company's warehouse and E. F. Spears & Sons Hemp House, nor does it say that any switching will be performed between any two industries in Paris, Kentucky, but it does say that certain charges will be assessed for the movement of property by car between the depot of the Louisville & Nashville Railroad Company and these three specific industrial plants. And such business moved under this tariff is auxiliary to the movement to and from Paris, Ky., of traffic handled by the railroad.

Q. Has the Louisville & Nashville Railroad Company ever engaged and does it now engage in switching cars between the three industries mentioned in the tariff?

A. No sir.

Q. Is it authorized by this tariff to engage in that?

A. No sir.

Q. Or between any other industries at Paris?

A. No sir.

Q. I refer you to page 263 of the same tariff relative to the terminals at Pensacola, Fla. Please explain that.

A. Pensacola, Florida is located on the Pensacola Bay, which is an arm of the Gulf of Mexico. It has developed into quite an important exporting and importing port. Business inward from foreign countries, and business inward from the Gulf of Mexico, and by the Gulf of Mexico from the fresh water streams is received at the wharves and moved from the wharves by car to the industrial plants within the town limits of Pensacola, and business from foreign countries is handled in the same manner. Later the property

moved outward from Pensacola to market, sometimes by rail to the east and north and sometimes by rail and water. It has movement outward continuously. The movement from the wharves or to the wharves is an auxiliary to the transportation service at New
430 Orleans in the same way that the movement at Henderson, Kentucky, is an auxiliary to the transportation service.

Q. Does that tariff authorize, Mr. Compton, or has the Louisville & Nashville Railroad Company ever engaged, or does it now engage in moving freight between two industries in Pensacola, where that movement is not an auxiliary to a transportation movement?

A. No sir. It is always as an accommodation.

Q. How is the situation at Pensacola with reference to the *station* at Henderson?

A. Why the situation is alike, and provided for alike in the Terminal Tariff.

Q. Mr. Compton, Mr. Powell testified that the rate on coal from Henderson, Ky. to Evansville, Ind was two cents on the hundred pounds. Is his testimony on that point correct?

A. We have a conflict in our tariff from Henderson to Evansville. The rate on coal to Henderson from mines on the Henderson Division is fifty cents. The measure of that rate is the competition in the Ohio River from mines on the Illinois Central and mines on the L. H. & St. L. road. The rate to Evansville is the same, fifty cents per ton. The measure of the rate from there is the competitive force *exerted* in the Ohio River and mines located within the town limits of Evansville, and also mines on the Southern Railway in the vicinity of Huntingburg, Indiana. When Mr. Nicholson came to me to establish rates from Henderson to the markets in Henderson I quoted him the same rate to Evansville as existed at that time — mines on the Henderson Division, fifty cents, and I gave instruction to have that rate issued and it was issued. But it seems that a rate of two cents per hundred pounds was also in effect, and there is a conflict between the two rates. That explains the difference between the rate ordered by me and the existing rate of two cents named. They are both in effect, and there is a conflict as to which is right. The fifty cents rate is the reasonable rate to charge.

Q. What was Mr. Nicholson's business at the time of your conversation with him?

431 A. He was an expert coal man who had been engaged in mining coal in Pennsylvania. He showed me that he had eastern parties interested with him or about to become interested with him in the development of what he called a good piece of coal property in Henderson.

Q. In the several conversations which you had with him he was the General Manager of that mining company?

A. Oh yes; I have had frequent conversations with him, and in fact I have had correspondence with people who said that he represented them. There isn't any question about Mr. Nicholson's developing the property down there for the owners and being interested himself.

Q. You mean the Keystone's property?

A. That became its Charter name.

Q. That is its charter name?

A. Yes sir.

Q. Has the Louisville & Nashville Railroad Company at any time moved grain or cobs from one of the elevator companies at Henderson to a milling company, dumped it out at the Milling Company for a charge of $2.00 per car for the service and $2.00 a car for car rental?

A. Whether or not any business has been moved under that tariff or not I don't know, but if it has, it has not been moved improperly for the reason that those cobs are like grain converted into feed and sold all over the south. I have in the last fifteen years arranged to move thousands of carloads of corn cobs from Henderson, Ky., to Columbia, Tenn. there to be milled into feed, for reconsigned thence to the south. Now whether or not they mix at Henderson now, under the pure Food Laws as they did before, I don't know, but it would be as proper to move a carload of cobs for milling purposes as it would be a carload of corn for milling purposes.

432 Cross-examined by attorney for plaintiff:

Q. Mr. Compton, under what tariff and under what arrangement is it that if a barge of corn is received at the Henderson wharf, and is delivered to one of the Henderson elevators you charge $2 a car switching, but if that same car is put at Marshall & Alves' plant for instance, there to be loaded with corn and delivered to the Henderson Elevator, you charge $2.00 per car for switching, plus $2.00 for car rental of the car.

A. The tariff applies to Marshall & Alves the same as to the Henderson Elevator Company, and the same conditions apply from the wharf to their respective places of location in Henderson at the same rate.

Q. That is not the question. My question is, Under what tariff is it that you charge a switching rate of $2.00 per car from the wharf at Henderson to one of the elevators, whereas you charge $4.00 a car from one of the elevators to another elevator?

A. As stated before, our charges from the wharf boat to the industries on our line are alike to all. The movement of a car from an elevator to the grain house of Marshall & Alves is a different movement. Now for that we charge when we perform that service $2.00 plus $2.00 making $4.00.

Q. Well, now why is it that you charge $4.00 for that service and only $2.00 for the other service. Doesn't the Railroad Company get the same benefit, if your rate is based only on the milling in transit business, doesn't the railroad company get the same benefit when the car is hauled from the river to one of the elevators and shipped out, that it would get if the grain was hauled from one of the elevators to another elevator and shipped out?

A. Well, you must take this into consideration. When you move the grain from the wharf boat to the elevator that one movement should constitute all the movements necessary for the con-

433 duct of the re-shipping business from the Ohio River landing to the south. Now if after a car has been moved from

the wharf into the elevator, and we are asked again to move from an elevator to another elevator, you would have circumstances to arise or circumstances arising that would justify the second movement at the same price as the first movement and I think the difference in those circumstances justifies a difference in the charge.

Q. What are the differences in the circumstances, the difference in the circumstances. You already had one movement.

A. We can't move property time and time again as an accommodation.

Q. Does the Railroad Company in the milling business or in the transportation of the grain move from one industry to another only the grain that has been brought to that industry by the railroad company?

A. That is impossible of a true and concise answer for this reason: When grain is put into an elevator and mixed, river grain and rail grain and wagon grain in the same bins, it is absolutely impossible to separate it after that has once been done, and for that reason you can't tell whether or not the same grain that moved in moves out.

Q. You can, Mr. Compton, though, tell that the same quantity of grain that moved in moves out, can you not?

A. Well yes: sir *sir*.

Q. Now isn't that the basis of your milling in transit arrangement, that when grain is shipped into a place for re-handling and is afterwards shipped out within a given time, the theory is, is it not, that the same quantity of grain that has been shipped in, or not exceeding the same quantity of grain that has been shipped in is shipped out, is it not?

A. I will have to qualify that answer in this way: The milling in transit and re-shipping rules provide that the equivalent of the inbound movement shall be shipped out, in order to get the benefit of milling in transit. That is to say that on grain you ship out it
is pound in and pound out. In mill products it is the equiv-
434 alent in the finished product of the inbound business less the wastage. That is re-shipping and milling in transit on true basis. Here we have a movement at so much per car between certain points, not based on poundage, but based on the movement for a car, or charge for the movement of the car. Now as I said a while ago, the movement of that car at a charge per car from the river to the elevator, or from the elevator to the mill is an auxiliary movement to the transportation service from Henderson to destination in the south.

Q. What tariff is it upon which you handle the grain business at Henderson from one industry to another at the rate of $4.00 per car?

A. That is the only tariff that we have, the one which you presented to me.

Q. That is the tariff by which under section 9 it is provided that they would only move it as an accommodation, is that it?

A. Yes, section 9, page 130. I understand that I am answering

Mr. Clay as to the movement of property by car from one industry to another as an accommodation.

Q. Have you any arrangement there for moving commodities from one industry to another except as an accommodation?

A. No, except this rule 8, which makes this provision, and I don't think it has any bearing upon this controversy. It provides in the second section that any subsequent switch movement to a location on the L. & N. tracks will be considered a local movement, and will be subject to charges and rules as provided for in rule 9 except that car rental charge will not be assessed where no part of the shipment has been unloaded, nor additional freight has been placed in the car. Now the explanation of that section is this: Suppose Mr. Clay had a carload of lumber from Nashville, Tenn. consigned to himself at Henderson and Mr. Clay had an industry located on a railroad track. When that carload of property was put on his track alongside of his industry, he concluded that the
435 lumber did not come up to the grade that he purchased. The railroad company had complied with the terms of its contract. It had taken the property from Nashville, Tenn. to Henderson, Kentucky, and had placed it at the premises of the consignee, Mr. Clay. Mr. Clay rejects the property, and says he will not receive it. The man who owns it sells it to another party, and says I want to move it over to Mr. Jones' switch. He will receive this car. We move it from Mr. Clay's switch to Jones' switch, and he receives the property, and that is what that means, and we charge $2.00 for that second movement.

Q. Getting back to my question, you have no tariff whatever by which you are authorized to charge $4.00 per car for switching from one industry to another in the city of Henderson except that section 9 of the Terminal Tariff in force at Henderson?

A. That is my understanding, Mr. Clay, yes sir.

Q. Now whenever an elevator or a person engaged in the grain business wants to ship a carload of grain from one of its industries to another industry in Henderson, you have made it at Henderson, or your Company has made it at Henderson a universal rule to accept that shipment, furnish the car, and collect for that $4.00 per car, have you not?

A. Wherever that service has been performed that would be a correct charge.

Q. How do you know of any request for service of that kind ever having been made by any of the grain elevators in Henderson, and refused?

A. I don't know that I do. I would say to you frankly that if Mr. Bullitt or Mr. Waller came to me and said "I desire to move grain from my elevator into Highleyman's mill there to be converted into hominy, or some other mill product," that I would cheerfully move it for him just the same as I would to Nashville, Tennessee, direct for milling in transit at Nashville. And whether the milling in transit occurred at Highleyman's mill at Henderson, or whether it occurred at some other mill at Nashville, it would be mill-
436 ing in transit, and the movement from Waller's elevator to Highleyman's mill would be an auxiliary to the through movement.

Q. If a person wants to move a carload of grain in Henderson from one mill to another, does he have to come to you to get your permission to move that grain?

A. No. Do you mean to C. B. Compton at Louisville?

Q. Yes.

A. Oh no, he goes to our representative to have his work done, and this representative can make the charge that this tariff provides, and he can't do anything else, and if he don't undertand it, he must ask C-pt. Howell, his immediate superior for his interpretation, and if Capt. Howell don't understand it, or it is possible he should not understand it, he must come to us for interpretation.

Q. Give me the rule or the tariff or the regulation or the statement in any schedule of rates which provides that the railroad company will charge grain dealers $4.00 per car for shipment between those parties, but will not charge coal dealers?

A. I don't pretend to make any such statement. I say we handle business for everybody in Henderson under the identical conditions, and we don't make any exceptions with regard to one set of property, or give it favor over another kind or set of property. The railroad company moves grain from the elevator to the mill as an auxiliary to the transportation service incident to milling in transit. It doesn't engage in moving flour or hominy from Highleyman's mill to the wholesale grocer in Henderson, nor does it engage in moving corn either from Waller's or Bullitt's elevator to a feed store or livery stable in Henderson; nor does it engage in the movement of coal from the Keystone mines to an industry or a team track or any other place in Henderson; nor does it engage in the movement of any property at $4.00 per car made up of $2.00 for the service and
437 $2.00 for car rental on any property other than that which is incident to milling in transit or as an accommodation to some one who is in trouble.

Q. Now I will ask you to give me the provision of that tariff which says that you will handle grain only as an auxiliary to milling in transit?

A. I don't think the tariff makes that specific statement, but all who are engaged in the transportation business know of milling in transit, in fact your city can't get along without it, and we have engaged in it there so long and under these rules and regulations, that we don't think that it is necessary to undertake to express it in any other different terms than that which is now expressed.

Q. That is as an accommodation to the shipper and on no other basis?

A. I didn't say that, I have not said, and I don't intend to say it. I say that the arrangement from the river to the elevator and from the elevator to the mill is an auxiliary to the transportation service. The L. & N. Railroad might reasonably say: You can ship it out from the elevator, or to the mill, you can go and get it at some other place, but that isn't doing Henderson justice. Henderson should have the same arrangement for milling in transit, whether from the river or from Evansville, or Chicago or St. Louis or from the river or from the elevator in Henderson to destination in the

south, that the man at Nashville, Tennessee has got, and the man at Evansville has got, and the man at Birmingham, Montgomery, Atlanta, Chattanooga or any other point that competes with it, and that is all we have done. We have put him on a parity with the other shipper from the north, with the reshipper from Evansville of the grain to the miller at Nashville who converts it there into mill products, and he has been put on the identical through basis by this means with the other shipper, with the Nashville shipper and others with whom he competes, and this is a thing that he needs, and it is a movement incident to transportation.

438 Q. I am not at this time finding fault with your tariff or the arrangement by which your tariff is arranged with regard to the grain business. What I am trying to get at is whether or not you furnished these facilities to the grain people under that provision which says you will do it only as an accommodation or not?

A. Yes sir, we do this thing for the Henderson reshipper, because we think it is right that he should have it, and we do not believe that because he has got that which he is entitled to under a reshipping arrangement furnished him, a movement from the elevator as an auxiliary to the through transportation that that is any reason why a man at a coal mine has got any claim on the L. & N. Railroad to do this transportation, in competition with cars. This meritorious arrangement set forth in here for the mills at Henderson should not be used as a means of trying to force down a rate on coal in force or force in a rate on coal, and that seems to be your intention, to criticise milling in transit and reshipping at Henderson. I don't think there is a miller or grain dealer in Henderson who has ever found any fault with the arrangement for milling in transit or reshipping, and I don't believe that they will be willing that you should criticise this as not having merit.

Q. When the time for argument of this case comes Mr. Compton I shall present then the proper argument to the Court. I do not wish now to indulge in an argument with you, and I will therefore ask you in replying to my questions to answer the question without going into an argument of the proposition involved in my question. You are a witness upon the stand and not counsel for the railroad company in the presentation of this case, and we will not only get along faster, but it will make your testimony competent if you will reply to the questions and not indulge in an argument. Now my question is do you——

A. Will you excuse me just a minute——

Q. No. I desire, I am putting the question to you now——

439 Q. (To the stenographer:) I want you to put down all of this, every word.

A. Yours or mine.

A. Both. My question to you is, do you provide this arrangement to the elevator or as an accommodation to the Louisville & Nashville Railroad Company? Now answer that question.

A. After you have finished your lecture to me as to what I should do on the witness stand, and what I should not do, I will try to answer your question, but I do not propose that you shall tell me how

I shall answer your questions when you put them in the way that you do.

Q. I only want you to answer the question in the proper way?

A. I understand as well as you do what the oath is, and I have confined myself to this, and I propose to continue to do it.

Q. Will you answer the question?

A. The movement at $2.00 per car for the use of the car and $2.00 for the auxiliary movement is an accommodation to the miller and to the grain dealer at Henderson.

Q. You are the same Mr. Compton who gave your deposition in this case on the 15th day of January are your not?

A. Yes sir; this is my signature Mr. Clay.

Q. Do you know whether or not when a carload of grain is loaded at one of the elevators in Henderson for transportation and delivery to one of the other industries in Henderson any inquiry whatever is made or has ever been made by your agent at Henderson as to where that grain was ultimately going, or what disposition was to be made of it ultimately?

A. Mr. Clay the agent at Henderson has authority to move property as the tariff provides. If that tariff has been misapplied, I don't know. I can't believe that the agent at Henderson would misapply it intentionally. I must say that I never saw a car moved
440 from the elevator to the mill nor from the wharf boat to the mill, but I do know that the movement occurs, and I made the specifications in this tariff to provide for it, and our agents are expected to carry out those instructions.

Q. Which instructions?

A. The instructions contained in the tariff.

Q. But that tariff only provides that it shall be done as an accommodation. Now under that tariff, and taking that tariff alone as a guide without any instructions from the Traffic Manager, what is to prevent the Louisville & Nashville or the agent of the Louisville & Nashville Railroad Co. from moving a carload of coal from the Keystone Mining Company to any industry in Henderson, just taking the tariff itself as the guide?

A. Well, so far as the movement of the grain is concerned of course a shipper could misrepresent the transaction. That is not an impossibility. The railroads publish their tariffs and their rules and regulations as the law provides, but I don't know of any law that will prevent somebody or a man violating the law. So far as the movement of grain is concerned I have endeavored to explain to you why such is done. I have endeavored to show that we do not engage in transportation between points in the city of Henderson. Now let me finish.

Q. Go ahead, just make all the argument you want to.

A. I have endeavored to show that we do not move property except under these exceptional circumstances as an accommodation. Now as to the movement of coal to which you refer specifically, the Railroad did not believe that it would be proper to move coal between two points within the city of Henderson, because it was in the City, it had its own teams, its own facilities, if it did not have them it could have employed them to deliver coal by its own devices in

the City of Henderson without asking the railroad for the use of the car, and we concluded that it would be entirely reasonable not to handle that character of business as an accommodation or otherwise.

Q. I still go back to my question. I repeat, taking the
441 tariff, and especially section 9 of that tariff, and taking the words according to their terms, without any outside reasons controlling, is there anything in section 9 of that tariff which provides that switching will be done, or transportation if you prefer the term, will be done from one industry to another in the grain business, and not in the coal business?

A. No sir.

Q. Then the only way the agent at Henderson can accept shipments from one industry to another in the city for the grain business and refuse it for the coal business is the special instructions which that agent gets from his superior officer of the company?

A. Yes sir.

Q. So that so far as the public is concerned in your published tariff you are just as much obligated according to section 9 of the tariff to accept those shipments in the coal business as you are in the grain business?

A. No sir.

Q. According to the wording of the tariff?

A. No sir.

Q. Isn't it just as much an accommodation to the coal merchant and coal dealer for him to have his coal shipped from one point to another, as it is to the grain dealer to have his grain shipped from one point to another?

A. No sir.

Q. Is it not?

A. No sir.

Q. Do you know what the switching arrangement in Evansville is?

A. I think so. It is set forth in this tariff.

Q. Do you know whether or not the Louisville & Nashville Railroad Company ships or switches coal from the Ingle Coal Company to any of the industrial plants in the city of Henderson?

442 A. I do not, sir.

Q. Do you know that they do not do it?

A. No sir.

Q. Examine your tariff with reference to Evansville and state whether or not such a switching charge is authorized under that tariff?

A. It does not authorize it.

Q. Do you find the same provisions there that you do in section 9 of the tariff at Henderson?

A. I do.

Q. Do you know whether any of the coal is switched from any of the coal mines in Evansville to the plants here?

A. I do not, but I don't believe so.

Q. How about the work at Mt. Vernon, Indiana. Is there any switching there from industry to industry?

A. Not to my knowledge.

Q. Now is there anything in the tariff at page 1333 with reference to Hopkinsville showing that stone screenings shipped from the Dalton Stone Company is for use by the municipal corporation and no one else?

A. No sir.

Q. On the other hand, does not that tariff expressly provide that the stone screenings shall be shipped to all industries on the tracks of the Louisville & Nashville Railroad Company in the Hopkinsville, Ky. switching limits?

A. The deliveries provided for in the tariff are specifically thus: "All industries on the tracks of the Louisville & Nashville Railroad in Hopkinsville, Kentucky switching limits." That description means the town itself. Industries such as mills, elevators, and tobacco factories do not use stone. They do permit the city authorities when they get stone to use their industrial tracks. I have never seen any of the industries refuse as an accommodation to the City, in permitting the use of their track to unload stone. It is customary generally for industries to do that.

443 Q. Mr. Compton, can you say that no industry in the City of Hopkinsville, Ky., has ever been shipped stone and screenings by the Dalton Stone Company for its own use?

A. No sir, no sir.

Q. If an industry in Hopkinsville wanted stone and screenings for its own use under that tariff the railroad company would transport and deliver it from the Dalton Stone Company's plant, would they not?

A. I think so, but want to explain this, that the tariff was put into effect for municipality. That was its object.

Q. Mr. Compton what is to prevent the railroad from putting in tariffs for the benefit of cities and the inhabitants thereof? Why not if it would benefit the city of Henderson and the inhabitants thereof, why not put in a tariff at Henderson that would enable the people of Henderson to get the benefit of the mining of the coal within its own limits, and the benefit of the switching privileges at Henderson?

A. I don't think if we would haul coal from the coal mines it would have any effect whatever on the price of coal to the consumer.

Q. Turning to the tariff at page 353, Canton, Ga. does not that tariff provide for a rate on all classes of freight between all industries in the switching limits, of $2.00 per car for switching and $3.00 per car rental?

A. It does, but I say to you most emphatically that the only property that it is possible to move under that tariff is marble. That is all there is to it. It is really milling in transit. It is milling in transit of marble at Canton, Ga.

Q. If anybody at Canton, Georgia, or if a plant or any other industry at Canton, Georgia wanted to ship a carload of furniture from one industry to another at Canton, Georgia, couldn't it be shipped under that provision of the tariff?

A. No sir, there is no industry at Canton, Georgia other than

the marble industry. I don't think the town is big enough
444 to use a carload of furniture.

Q. What is the population of the town?

A. I don't know what it is. It is small.

Q. Suppose the Marble Company at Canton wanted to ship a carload of machinery instead of a carload of marble from its plant to another industry in Canton, wouldn't it be shipped under that tariff?

A. I suppose if one of the marble industries there desired to erect a new shop and take the machinery out of its then existing shop and put it in the new, I think it would be competent to do that, it would be an accommodation.

Q. Suppose they wanted to haul a carload of scrap iron out of their shop into another industry there, wouldn't it be hauled?

A. No sir; that is an impossibility. There is no other industry there, Mr. Clay, and in order to cover the matter completely and thoroughly that description was used. It cannot be applied as you have stated, because there is no business of that character to move. That tariff could be changed so as to say carloads to and from the marble industries. That is all that is necessary to say in regard to the application of that tariff, and it covers that which I have stated and nothing else.

Q. Do you really mean to say that there is absolutely no manufacturing plant of any kind at Canton, Georgia, except the marble industries?

A. I certainly do.

Q. And there is no industry of any kind, no hardware store or merchandise store or anything of that kind?

A. Oh, they have small stores in the village, yes, but they are not served by railroad tracks.

Q. How many marble works are there on the line within the switching limits of Georgia?

A. I think there are three or four.

Q. If one party had a carload of marble that he wanted to transport and deliver to another concern there, under this tariff
445 the Railroad company would do it for this charge of $5 per car total, would it?

A. It would be a movement, understand, under that tariff, it would be an auxiliary movement to the transportation service at that price.

Q. How do you know that Mr. Compton?

A. Well, I know that there is quarried at Canton, Ga. hundreds you might say thousands of carloads of marble per annum, and we know that the business must move from there to be consumed. The town of Canton, Georgia cannot consume the output of the marble quarries at its own point. It is impossible. We know by the nature of the thing, Mr. Clay that the business must move to the market. It is quarried for the market.

Q. Do you know whether in any of those plants live stock are kept or not, for use in the business?

A. I think not. I don't think they use any stock at all.

Q. What kind of plants do they have?

A. They have plants that are constructed of wood mostly. They are crude sheds into which the cars are run. The marble is unloaded from the car on to what they call the sawing block, and there placed under the saws to be sawed in shape.

Q. Is there enough lumber at any one of those plants to make a car-load if the buildings were torn down or any part of them were torn down?

A. I am sure I don't know.

Q. Suppose that one of those plants would tear down half of its building, and should notify the Railroad Company to place a car and should load that lumber into that car, and should direct the railroad company to haul it up to one of the other plants and there deliver it. Wouldn't the railroad company do it under this tariff?

A. As an accommodation it would, yes.

Q. Would it do it as an accommodation or under this tariff providing for the switching at Canton?

A. It would do it as an accommodation.

446 Q. Doesn't the tariff provide that it will do it between all industries at that rate, regardless of the commodity?

A. The construction that you place on it is highly improper. It would only be done as an accommodation.

Q. That would be a class of freight wouldn't it, and come within the term "all classes of freight"?

A. Not under that tariff.

Q. Is there anything in the tariff at Canton about an accommodation?

A. It is our custom generally over the entire system to not undertake the movement of property between any two points within the limits of a city in competition with drays or the driving of live stock, and we do it only as an accommodation. These tariffs provide for an auxiliary movement to the transportation service, and that is the intent and purport of the tariff.

Q. I will get you to examine the terminal tariff showing the switching charges at Canton, Georgia, and show me where it is provided in that tariff that it will be done only as an accommodation?

A. I will ask you to look at the tariff and show me where it is not provided for.

Q. You are the witness on the witness stand, and I am examining you, and you are answering my questions, and I am not answering yours. My question to you is to show me where it is provided in that tariff that it would only be done as an accommodation?

A. I will refer you to that tariff from page 1 to page 354. You will find throughout the provision that the Louisville & Nashville Railroad Company does not engage in local switching between switches, tracks or warehouses, but where any such service is performed as an accommodation the tariff shall be assessed.

Q. Wasn't the provision that you have just read with reference to the tariff at Evansville, and not with reference to the tariff at Canton, Georgia?

447 A. I stated that throughout the tariff that provision was provided for in the tariff. That provision applies also at Canton.

Q. Is there anything in the tariff showing that it applies at Canton?

A. Throughout the tariff it is so provided.

Q. Now with reference to that provision where it is provided that it does not engage in the business of coal switching between switches, can you find a single place in that whole tariff where that provision is in it without naming the City with reference to which that provision applies?

A. I will say to you that that is the rule generally of the Louisville & Nashville Railroad Company, and that is the rule we observe, and the one we require our people to observe. We do not engage in the movement of property between points within the limits of cities or town. I state that most emphatically.

Q. Now is there a provision in the terminal tariff where that statement is made except where, in the provision itself the city is named where that exception comes?

A. It is named, as I stated to you before, throughout the tariff. I say to you——

Q. Turn to the tariff?

A. I say to you most emphatically that we do not engage in the transportation of property between points within the limits of cities. Now we do not do it at Canton, Georgia, or Evansville, or Hopkinsville, or any other town.

Q. Can you tell me then what it means by saying at Canton, Georgia on all classes of freight between all industries in switching limits?

A. Yes, as I explained before Mr. Clay, it was simply a simple way of expressing it, that is all.

Q. Mr. Compton let me get the milling in transit arrange-
448 ment: Does that mean that if the Henderson Elevator Company has say 100,000 bushels of corn at points in Indiana, that they can ship that grain to Henderson, rehandle it, and ship it out to some point, say Nashville, paying the local freight on it from the Indiana points to Henderson, and then getting the benefit of that rate in the through rate to the other points. Is that a milling in transit arrangement?

A. Yes sir. May I explain it to you?

Q. Yes. If that doesn't fully explain it, just give me the explanation of the milling in transit arrangement?

A. I think you did not draw out the facts fully. Under the arrangement from the point north of Evansville you said these cars would move to Henderson. It would move from Henderson to the destination in the south under the reshipping and milling in transit arrangement at the same rate to destination from the original point that a shipper at the original point would be charged

Redirect ex. by COUNSEL FOR DEFENDANT:

Q. Is it necessary to give the milling companies at Henderson a milling in transit arrangement to enable those companies to compete with milling companies at other points?

A. Yes sir.

Q. Is it necessary to give the Crescent Coal Company or the Keystone Mining & Manufacturing Company a rate of $2.00 per car or any special rate to enable that company to compete with other coal companies in that territory?

A. No sir.

Defendant then read the deposition of HENRY LIVERIGHT which is in words and figures as follows:

Questions by Mr. MALCOLM YEAMAN for def't:

Q. If you hold any position with the Keystone Mining & Manufacturing Company, state what that position is and how long you have held it?

449 A. I am at present Secretary and Treasurer of the Keystone Mining & Manufacturing Company and have been the Secretary of the same since practically its formation, with the exception of about one year when I was sick, during which time Mr. Shiffer was Secretary. That was from July 1907 to June 1908 about that Mr. Shiffer was Secretary.

Q. As secretary of the Keystone Mining & Manufacturing Company have you knowledge of the extent and character of its business, of the quantity of coal mined and of the actual capacity of the mine?

A. I have so far as the books show and partly from my own knowledge.

Q. How long have you been acquainted with the Keystone Mining & Manufacturing Company plant in the City of Henderson?

A. Almost from its formation.

Q. To what extent, if at all, are you personally interested in it?

A. I own bonds and stock of the same.

Q. About what amount in all has been invested in that plant?

A. About $230,000.

Q. Is the Keystone Mining & Manufacturing Co. running now, taking out coal?

A. No.

Q. When did it cease operations?

A. About the middle of May 1909.

Q. At the time it ceased mining coal and for the period of its existence up to that time, what was the actual mining capacity of the plant?

A. From 150 to 200 tons a day.

Q. What amount did it actually take out?

A. Well, we took out about 30,000 tons of coal from June 1907 until the middle of May 1909, but previous to that we took out some coal which was mined by day laborers in opening the mine of which we have no record of the tonnage exactly.

Q. Then if I understand you, your actual capacity was from 150 to 200 tons a day; that is, you could have taken out that
450 quantity had there been occasion for it?

A. Yes sir.

Q. And not counting that that was taken out previous to the time you kept a record, there was taken out in all some 30,000 tons?

A. Yes sir; about 30,000 tons.

Q. How deep is the shaft of that mine and through how many veins does it run?

A. The No. 9 is about 160 feet below the surface and the other is about 450 or 460, the No. 11.

Q. When did the plant cease mining the lower vein, the No. 11?

A. In the winter of 1908-1909. We abandoned it about January or February 1909?

Q. Why was the lower vein abandoned?

A. There were several reasons, and in the first place it was more expensive to mine and then we had bad roof.

Q. As I understand you, the mine closed down entirely in May 1909?

A. Yes sir; the middle of May 1909. We worked on the first half of May and after that we quit working.

Q. Why did the mine close in May 1909?

A. We had not sufficient orders to make it pay.

Q. When did Mr. L. A. Bosserman leave the plant?

A. At the beginning of February 1909.

Cross-examined by JAS. W. CLAY for pl'ff:

Q. If I understand you then from about July 1907 to July 1908 you were not connected with the Company?

A. Only as a stockholder and bond holder.

Q. When you say stockholder and bondholder you don't mean that you own the entire stock and bonds?

A. Oh no.

451 Q. About how much stock and how many bonds do you own?

A. $18,500 stock and $10,000 bonds.

Q. And you think running full capacity of the mine from 150 to 200 tons a day is as much as they could get out?

A. Yes sir.

Q. And you shut down in May 1909 because you didn't have enough orders to justify the operation of the mine?

A. Yes sir.

Q. Putting the total capacity in tons per year, what in your judgment is the total capacity running up to the limit per annum prior to the time you shut down?

A. We could have mined 50,000 tons but you must understand the mine increases in capacity as you have orders.

Defendant rests.

Witness J. O. HIGDON is again recalled on his own behalf.

Mr. CLAY for pl'ff:

Q. Mr. Powell testified that in April 1908 at the time this car of coal was shipped from the Keystone to the electric light plant he told you that the Company would not perform that service any longer; I will get you to state to the jury whether or not that is a fact.

A. No sir.

Q. I will ask you when was the first time you were informed of that fact?

A. About the 14th of June.

Q. On what occasion was that?

A. After he had switched a car I had ordered and I ordered another car he told me that he could not furnish any more cars in the absence of specific instructions.

Q. That was after he had shipped three cars in June?

A. Yes sir.

Cross-examined by Mr. MALCOLM YEAMAN for def't:

Q. Did you get switching bills for those cars?

A. Yes sir.

Q. Have you them with you?

A. No sir; I filed them with Mr. Clay at the time the suit was brought.

Q. Did it give the number of the car, the date and all?

A. I have a record of the number of the cars and the disposition of some on my ledger.

Q. When you made this contract with Keystone Mining & Manufacturing Company why did you not go directly to that Company and negotiate with them?

A. Because from my knowledge of the tariff I saw a great profit in the business and I knew as a competitor of the Keystone after I went to soliciting this contract perhaps it could not be made, that they would want them themselves.

Q. And for that reason you preferred negotiating it through attorneys?

A. Yes sir.

Q. You stated the other day that you had seen this tariff that was read to the jury and the charge about switching in Henderson to the effect that the L. & N. did not engage in the switching business within the terminal limits of the city of Henderson and that when it did switch for accommodation it would charge $2 for switching service and $2 for car rental; having seen that schedule or tariff why did you not go directly to Mr. Powell or some one authorized to speak for the L. & N. and ascertain if they would do that service?

A. I know that they stated and it said in that tariff that they did not engage in switching as a business, that they did it for
453 accommodation and when they did that there should be a charge of $2 for the service but the fact that they did switch corn, and cobs and other commodities from industries lead me to

believe that they would switch the coal and I didn't feel the necessity of going to Mr. Powell to ask him and for another reason I didn't care to make by business known. As I said, there was a profit in it and I had no reason to believe that Mr. Powell wouldn't go to the Keystone with it.

Q. You had seen the tariff rate and yet you didn't go to Mr. Powell or any one else to ascertain if they would switch your coal?

A. I didn't think it necessary.

Q. Did you go to Mr. Powell?

A. No. They switched coal for me on application for empty and they also switched it for the elevator.

Q. That is, one for each?

A. I think so, before this option or this contract were entered into and after the option was taken they continued to switch for me.

Q. After they had given you information that they wouldn't switch it at $4 per car, why did you continue to make so many requisitions for cars and reduce your telephone messages to writing, and preserve copies of those letters?

A. To complete my business record in the office.

454 STATE OF KENTUCKY,
County of Henderson:

I, Augusta Fitzgibbon, Official Stenographer, for the Henderson Circuit Court in the case of Crescent Coal Co. vs. Louisville & Nashville Railroad Company do certify that the foregoing is a complete and accurate copy of the evidence heard in the trial of the case at the September Term 1911 of the Henderson Circuit Court.

Given under my hand this October 18th, 1911.

AUGUSTA FITZGIBBON,
Stenographer.

STATE OF KENTUCKY,
County of Henderson:

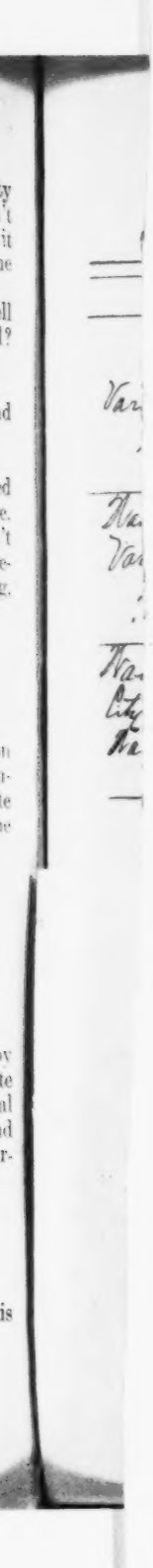
I, J. W. Henson, Judge of the Henderson Circuit Court hereby certify that the within and foregoing is a full, true and complete transcript of the evidence introduced by both parties on the trial of the case of Crescent Coal Co. vs. Louisville & Nashville Railroad Company tried at the September Term 1911 of the Henderson Circuit Court.

Given under my hand, this October 24, 1911.

J. W. HENSON,
Judge Henderson Circuit Court.

Exhibit filed with the foregoing deposition of R. W. Powell is attached to the following sheet.

(Here follow sheets marked pages 455 to 462.)



CHARTS

TOO

LARGE

FOR

FILMING

463 With the foregoing transcript the appellant, the Louisville & Nashville Railroad Company filed its statement of appeal in words and figures following, to-wit:

Statement.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOE HIGDON, Doing Business under the Name of Crescent Coal Company, Appellee.

1. The name of the appellant is Louisville & Nashville Railroad Company.
2. The name of the appellee is Joe Higdon, who was engaged in business under the name and style of Crescent Coal Company.
3. The judgment appealed from was rendered on October 6, 1911,—that being the twenty-ninth day of the September (1911) term of the Henderson Circuit Court,—and can be found on page twenty-seven of the transcript.
4. The appeal was granted by the court below, and no summons or warning order is desired.
5. Clay & Clay, of Henderson, Kentucky, are the attorneys for the appellee.

YEAMAN & YEAMAN,
B. D. WARFIELD,
C. H. MOORMAN,
Attorneys for Appellee.

464 Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort on the 11th day of April, 1912, the following order was entered:—

L. & N. R. R. Co
vs.
HIGDON.

Henderson.

Came the appellee by counsel in this case and moved the court to advance same under Rule 16 and the court being advised this case is advanced and submitted.

Afterwards at a Court of Appeals held as aforesaid on the 18th day of April, 1912, the following order was etnered:—

L. & N. R. R. Co.
vs.
HIGDON.

Henderson.

Came the parties by counsel in this case and by agreement filed copies of the supersedeas bond and supersedeas as part of the record.

The copies of the bond and supersedeas found by the foregoing order are in words and figures following, to-wit:—

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company, Appellee.

Agreement.

It appearing that the judgment appealed from herein was superseded in the court below, but that no copy of the supersedeas bond or supersedeas is filed with the record herein, it is hereby agreed between the parties that the copy of the supersedeas bond hereto
465 attached, together with certificate of supersedeas hereto attached, may be filed as a part of the record in this case, to have the same force and effect as if filed with and made a part of the original record.

This April 16th, 1912.

YEAMAN & YEAMAN,
Attorneys for Appellant.
CLAY & CLAY,
Attorneys for Appellees.

STATE OF KENTUCKY,
Clerk's Office of the Henderson Circuit Court:

I do certify that an appeal has been granted from this Court from a judgment obtained by Crescent Coal Co., against Louisville & Nashville Railroad Co., for $3037.10 with 6% interest from Oct. 6th 1911 until paid and costs in the Henderson Circuit Court at its September Term, 191—, and that a Supersedeas bond has been executed within thirty days after the Appeal was granted. Wherefore the appellee and all others are commanded to stay proceedings on the judgment.

Witness my hand as Clerk of said Court this 18th day of Nov. 1911.

A Copy.

T. D. ALVES, *Clerk.*
WILEY L. DIXON, *D. C.*

Attest:
T. D. ALVES, *C. H. C. C.*

Return.

Executed on Crescent Coal Co., by delivering to Joe Higdon Manager of said Company a true copy hereof. This Dec. 22nd 1911.

466 A. H. ABBOTT, *S. H. C.*,
By R. B. EASTIN, *D. S.*

Henderson Circuit Court.

L. & N. R. R. Co., Appellant,
against
CRESCENT COAL CO., Appellee.

Upon an Appeal from a Judgment of the Henderson Circuit Court, Rendered — Day of October, 1911.

Whereas, Said Appellant Louisville & Nashville Railroad Co. having prayed an appeal from the Judgment of the Henderson Circuit Court rendered at its September Term, 1912 against it in favor of the Appellee for the sum of $3037.10 with 6% interest from Oct. 6th 1911 and costs and the Appellant desire to supersede the whole of the said Judgment above mentioned.

Now, We, Louisville & Nashville Railroad Company principal, and Citizens Trust Co., of West Virginia surety, do hereby covenant to and with the Appellee Crescent Coal Co. that the Appellant will pay to the Appellee all costs and damages that may be adjudged against the Appellant on the Appeal, and also that they will satisfy and perform the whole Judgment above stated in case it shall be affirmed, and any Judgment or Order which the Court of Appeals may render, or order to be rendered by the inferior Court, not exceeding in amount or value the Judgment aforesaid. (And also pay all rents, hire, or damage which, during the pendency of the Appeal, may accrue on any part of the property of which the Appellee kept out of possession by reason of the Appeal.)

Witness our hands, this 18th day of Nov. 1911.

The Bond is only required to be signed by the Sureties.

467

LOUISVILLE & NASHVILLE RAILROAD CO., *Principal,*
By YEAMAN & YEAMAN, *Att'ys.*
CITIZENS TRUST & GUARANTY COMPANY OF WEST VIRGINIA, *Surety.*
By JAS. M. YEAMAN,
By JAS. M. YEAMAN, *Att'y-in-Fact.*

T. D. ALVES, *Clerk.*
By WILEY L. DIXON, *D. C.*

1911. Nov. 18th, filed.

Attest:
T. D. ALVES, *Clerk.*
By WILEY L. DIXON, *D. C.*

A Copy.
Attest:
T. D. ALVES, *C. H. C. C.*

Filed Apr. 18, 1912. Robt. L. Greene, C. C. A.

Afterwards at a Court of Appeals held in and for the Commonwealth of Kentucky at the Capitol in Frankfort on the 21st day of June, 1912, the following judgments and orders were entered herein, to-wit:—

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
JOE HIGDON, Doing Business under the Name of Crescent Coal Company, Appellee.

Appeal from Henderson Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed and that appellee recover of appellant 10% damages on the amount of the judgment superseded herein. Which is ordered to be certified to said court.

It is further considered that appellee recover of appellant his cost herein expended.

468 On the same day, to-wit, June 21st, 1912, the Court of Appeals of Kentucky delivered an opinion herein, which is in words and figures following, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,
vs.
JOE HIGDON, Doing Business under the Name of Crescent Coal Co., Appellee.

Appeal from Henderson Circuit Court.

Opinion of the Court by William Rogers Clay, Commissioner. Affirming.

JUNE 21, 1912.

Appellee, Joe Higdon, doing business under the name of Crescent Coal Company, was, during the year 1908, engaged in buying and selling coal in the city of Henderson. Appellant, Louisville & Nashville Railroad Company, is a common carrier. Its main line runs into and through the city of Henderson. In addition to its main line, it operates and controls a belt line. Leading from its main and belt lines and running into various industrial plants in the city of Henderson, are several spur tracks which are used for the purpose of transporting freight to and from these industrial plants, and are operated by the railroad as a part of its line of road. During the year 1908, the Keystone Mining & Manufacuring Company was operating a coal mine in the city of Henderson. This

mine was connected with the main and belt lines of appel-
469 lant's road by a spur which appellant operated and controlled. During the month of April, 1908, appellee contracted with the Keystone Mining & Manufacturing Company to furnish and deliver to him on the spur track at its mine 20,000 tons of coal. After making this contract, he contracted with various industrial plants having spur connections with the line of appellant company to deliver to them at their plants in carload lots at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to appellant company to furnish him cars at the Keystone Company's mine for the purpose of loading and hauling the coal to the industrial plants and proposed to pay for the service $4.00 per car, or at the rate of about ten cents per ton. Appellant refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish the cars and perform the service at 50 cents per ton. Appellee refused to accept the service at that price. On August 13, 1908, appellant informed him that it would not furnish cars for this service at any price. Thereupon appellee brought this action against appellant to recover damages alleged to have been sustained by reason of appellant's failure to furnish him the service at the price of $4.00 per car. The case was transferred to equity, and on final hearing, appellee's petition was dismissed. On appeal to this court, the judgment was reversed, and cause remanded for a new trial consistent with the opinion. Crescent Coal Co. v. L. & N. R. R. Co., 143 Ky. 73.

470 On that appeal it appeared that appellant, in its printed and published rates, rules and regulations governing the handling of cars in the city of Henderson, had promulgated the following:

"The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Kentucky, terminals; but where any such service is performed as an accommodation, a charge of $2.00 a car, plus $2.00 for car rental, shall be assessed."

It was the contention of the railroad company on that appeal: (1) That appellee's cause of action was not determinable independently of a decision of the railroad commission adverse to the railroad company. (2) That the service demanded of the railroad company was not such a service as the law of public policy required it as a common carrier to perform, nor was it such a service that it engaged in or professed to engage in. (3) That the hauling of
grain and milling products between mills and elevators
471 at Henderson was entirely different from the intra-urban transportation which appellee sought to require the railroad company to engage in. (4) That the railroad company published no tariff rate for intra-urban transportation at Henderson; that the tariff provisions relied on by the plaintiff applied exclusively to switching services, and the service demanded by the plaintiff was a transportation service in that the coal was mined at one point in the Henderson station, and was to be transported from that point to another point in the same station. (5) That even if the rail-

road company did haul grain and milling products at the rate of $4.00 per car, it was not required by Section 215 of the Constitution of Kentucky to haul coal at the same rate.

In holding these contentions of the railroad company without merit, the court, in its former opinion, laid down the following rules:

(1) In the discharge of its duties to the public as a common carrier, a railroad must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat
472 without favor or discrimination all persons offering to it freight for carriage.

(2) A common carrier may hold itself out to the public as being a carrier of certain articles; and if it is only engaged in the carriage of the specified articles, it is not under any obligation to carry other things.

(3) No length of time or manner of treatment or habit of dealing will discharge a common carrier when requested from the obligation to furnish to the public the service it is engaged in performing.

(4) A railroad company may for its convenience in the handling, storing and distribution of its cars and freight, have yard facilities, including switches, spurs and side tracks, and it will not be obliged as a common carrier to transport from one point to another in such yards freight for the convenience of shippers.

(5) A railroad company owes to establishments connected with its line of road by spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for the transporta-
473 tion to one as it is to the other. It must serve all alike.

(6) A railroad cannot arbitrarily and without any relation to the use to which it is put, designate a part of its track or system as yards or switching limits, and assert that it owes no duty as a carrier in this district except such as it may choose to assume. It can not classify or divide its trackage into parts and say that on one part it is a carrier and on another it is not.

(7) When a carrier publishes a rate it will charge for a certain service, it must furnish to all persons demanding this service the same rate.

(8) If a carrier has no established rate that covers the service requested, it must fix a reasonable rate for such service.

(9) A carrier has a right to classify freight, and make a reasonable difference in its charges for different kinds of freight.

474 (10) A person sustaining loss by the failure of a carrier to transport freight tendered to it at its stipulated rate may recover any amount lost to him on account of contracts made on the faith of this rate.

In remanding the case, the court held that on the contract made in April appellee was entitled to recover the difference between what it cost him to fill the contracts he had made, whether before or after July 1, 1908, with industries having separate connections, and that he could have filled with coal from the Keystone mine between July

1, 1908, and July 1, 1909, and what it would have cost him to fill these contracts if he had obtained the coal from this mine. The court further held that as it appeared that the Keystone mine had ceased operations before July 1, 1909, the damages should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that appellee could have furnished in fulfillment of the contracts made with customers before that time.

On the return of the case, the railroad company offered an amended answer and a second amended answer. The trial court refused to permit these pleadings to be filed, but made them
475 a part of the record by order of the court.

The second trial resulted in a verdict and judgment in favor of appellee for the sum of $3,137.10, and the railroad company appeals.

Appellant insists that the first and second amended answers tendered on the return of the case presented a defense to the action, and the trial court erred in refusing to permit them to be filed.

By the first amended answer, appellant simply elaborated certain averments in the second paragraph of its original answer to the effect that it was not its duty to engage in the business of transporting freight or passengers between points in the same terminal or station. In addition to these averments, the first amended answer contained allegations to the effect that the rate of $4.00 a car was not adequate compensation for the service demanded by appellee, and that to compel appellant to perform the service at that rate would be to deprive it of its property without due process of law and to deny it the equal protection of the laws contrary to the 14th amendment of the Constitution of the United States.

By the second amended answer, appellant pleaded that to require the performance of the service demanded by the appellee at Henderson, would impose an unjust and unreasonable burden upon the interstate commerce business of the defendant, in violation of
476 Subsection 3, Section 8, Article 1, of the Constitution of the United States.

As the averments contained in the first part of the first amended answer are simply an elaboration of the defense presented by the second paragraph of the original answer, and as the court on the former appeal, in an opinion which is now the law of the case, held that they did not present a defense to the action, the further consideration of the first part of the first amended answer will be unnecessary. As to the contention that the rate of $4.00 a car is below the cost of service and therefore confiscatory, and constitutes the taking of property without due process of law, it must be borne in mind that the rate was not fixed by the railroad commission, but was fixed by appellant itself. The railroad company may not fix its own rates, and then complain of the fact that they are confiscatory. In our former opinion, we simply held that as appellant was engaged in furnishing cars for other shippers within the same territory at a rate of $4.00 a car, it was bound to furnish the same service
477 to appellee at the same rate. This did not impose upon appellant the burden of continuing a rate that was less than

the actual cost of the service. It had the right at any time to change the rate, subject to the limitation that the change should affect all shippers alike. It could not establish a certain rate for a certain service and deny to anyone similarly situated and entitled to such service the benefit of such rate. Where a railroad company fixes a rate for a certain service, it will not be heard to say that the rate was proper so far as certain shippers were concerned, and confiscatory as to others who are similarly situated and entitled to the same service. To so hold would nullify our constitutional provisions with reference to discrimination. We therefore conclude that to hold appellant liable in this case is in no sense to deprive it of its property without due process of law.

Nor does the second amended answer present a defense. The service to which appellee was entitled was wholly within the state of Kentucky. The shipments were intra-state shipments. The inter-
state commerce business of appellant was in no way involved.
478 Appellant was as much bound to obey the constitution and the laws of this state with reference to intra-state shipments as it was the acts of Congress with reference to interstate shipments. It could not escape its obligations under either law upon the theory that obedience thereto would impose upon it a burden with respect to the other. It has never been regarded as a burden on inter-state commerce to require a carrier to obey the state constitution with reference to purely intra-state shipments. The contention is certainly novel that to perform a service wholly within the state at a given rate for certain shipments is altogether proper, while the performance of the same service for another shipper similarity situated imposes an unnecessary and unreasonable burden upon the inter-state commerce business of the railroad company.

As neither the amended answer nor the second amended answer presented a defense to the action, it follows that the trial court did not err in refusing to permit them to be filed.

From a careful consideration of the evidence, we conclude that it is amply sufficient to support the finding of the jury.
479 The instructions being in conformity with our former opinion, and there appearing no error in the record prejudicial to the substantial rights of the appellant, it follows that the judgment should be affirmed, and it is so ordered.

For Appellant: Yeaman & Yeaman, Henderson, Ky.; C. H. Moorman, Louisville, Ky., Benjamin D. Warfield, Louisville, Ky.
For Appellee: Clay & Clay, Henderson, Ky.

[Endorsed:] June 21/12. L. & N. R. Co. vs. Joe Higdon.

480 Afterwards, to-wit, on the 10th day of July, 1912, the appellant, Louisville & Nashville Railroad Company filed in the office of the Clerk of the Court of Appeals its Assignment of Errors herein in words and figures following, to-wit:

Supreme Court of the United States.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff in Error,
v.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

The plaintiff in error, the Louisville & Nashville Railroad Company, assigns the following errors in the judgment of the Court of Appeals of Kentucky herein, namely:

1. The court erred in holding that, under Sections 214 and 215 of the Constitution of Kentucky, the refusal of the plaintiff in error to perform the service demanded by the defendant in error was a discrimination against said defendant in error, for which the plaintiff in error was liable in damages. Said constitutional provisions, when so construed and applied, violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deprive the plaintiff in error of its property without *the* process of law and deny to said plaintiff in error the equal protection of the laws.

2. The court erred in holding that it was the duty of the plaintiff in error to perform the service demanded by the defendant in error, at a rate less than the actual cost of said service. It was not the duty of the plaintiff in error to perform the service for any rate of compensation, or at all, and the judgment of the Court of
481 Appeals of Kentucky requiring the plaintiff in error to perform said service, for less than the actual cost of the service, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that said judgment deprives the plaintiff in error of its property without due process of law and denies to said plaintiff in error the equal protection of the laws.

3. The court erred in holding that it was the duty of the plaintiff in error to engage in the business of transporting freight between two private sidings at the same station. It was not the duty of the plaintiff in error, as a common carrier, to engage in such business; and the judgment of the Court of Appeals of Kentucky, requiring it to furnish equipment for, and engage in, said business, deprives it of control of its property and facilities and denies to it the right to make reasonable rules and regulations for the operation of its road and the use of its equipment as a common carrier. Therefore, we contend that the judgment of said court violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law and denies to said plaintiff in error the equal protection of the laws.

4. The court erred in holding that, inasmuch as the service demanded by the defendant in error was wholly within the State, the State has the right and power to require the plaintiff in error to

perform the service or respond in damages for failure to perform the service, even though the performance of the service by the plaintiff in error would unreasonably interfere with its interstate-commerce business and would impose a direct burden upon such commerce. The judgment, being based on said ruling, is, therefore, in violation of Subsection 3, Section 8, Article 1, of the Constitution of the United States.

482 Wherefore the plaintiff in error prays that the judgment of the Court of Appeals of Kentucky may be reversed by this Honorable Court, and this cause remanded to said Court of Appeals of Kentucky with directions to send down its mandate to the Henderson Circuit Court, directing it to dismiss the petition against the plaintiff in error.

YEAMAN & YEAMAN,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

Filed July 10th, 1912.
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

Filed July —, 1912.
—— ——, *C. C. A.*

1912 July 10″.
Filed in Office.
Att.:
R. L. GREENE, *C. C. A.*

483 At the same time, to-wit, July 10th, 1912, the appellant, Louisville & Nashville Railroad Company, filed in the office of the Clerk of the Court of Appeals its petition for Writ of Error, also the Writ of Error and the order allowing same, which said Petition, Writ and Order are hereto attached and returned herewith and are in words and figures as follows:

484 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company, Appellee.

Petition for a Writ of Error.

To the Honorable J. P. Hobson, Chief Justice of the Court of Appeals of Kentucky:

The Louisville & Nashville Railroad Company, appellant in the above-entitled case in the Court of Appeals of Kentucky, hereby petitions for the allowance of a writ of error from the Supreme

Court of the United States to the Court of Appeals of Kentucky, in order that the judgment of the Court of Appeals in that case may be re-examined by the Supreme Court of the United States, and reversed if found to be erroneous: The grounds of this application are:

1. That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that Section 214 and Section 215 of the Constitution of Kentucky, under which appellee, Joe Higdon, sues, and upon which he relies for a recovery in said action, and upon which it was adjudged by this court that it was the duty of the appellant to perform the service demanded by the appellee or to respond to the appellee in damages for failure to perform said services, can not be constitutionally applied to the facts in said case without violating Section 1 of the Fourteenth Amendment to the Constitution of the United States;

2. That the Louisville & Nashville Railroad Company
485 claimed, and still claims, in that case that it was not the duty of said Company to perform the service demanded by the appellee, for any rate of compensation or at all; and the judgment of the Court of Appeals of Kentucky, requiring the Louisville & Nashville Railroad Company to perform said service for less than the actual cost of the service, or to respond in damages to the appellee for failure to perform said service at less than the actual cost thereof, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States;

3. That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that it was not its duty as a common carrier to engage in the business of transporting freight between two private sidings at the same station; and the judgment of the Court of Appeals of Kentucky, requiring it to furnish equipment for, and engage in, said business, deprives it of a reasonable control of its facilities and denies to it the right to make reasonable rules and regulations for the operation of its road and the use of its equipment as a common carrier, and therefore violates Section 1 of the Fourteenth Amendment to the Constitution of the United States; and

4. That the Louisville & Nashville Railroad Company claimed, and still claims, in that case that to require it to perform the service demanded by the appellee or to respond in damages for failure to perform said service, would unreasonably interfere with the interstate-commerce business of said Louisville & Nashville Railroad Company and would impose a direct burden upon such commerce; and the judgment of the Court of Appeals of Kentucky requiring the Louisville & Nashville Railroad Company to perform said service is, therefore, a violation of Sub-section 3, Section 8, Article 1, of the Constitution of the United States.

And the said Louisville & Nashville Railroad Company further petitions that upon the allowance of said writ of error, and
486 the execution of a supersedeas bond to be approved by your Honor, that the mandate of this court be suspended, and that no execution be issued for the satisfaction of said judgment, pend-

ing the argument and decision of this case in the Supreme Court of the United States.

YEAMAN & YEAMAN,
BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Louisville & Nashville Railroad Company.

Filed July —, 1912.

—— ——.

Filed July 10th, 1912.
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

1912, July 12, filed in office.
Att.:
R. L. GREENE, *C. C. A.*

487 UNITED STATES OF AMERICA,
Eastern District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judges of the Court of Appeals of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Kentucky, before you or some of you, between the Louisville & Nashville Railroad Company, appellant, against Joe Higdon, doing business under the firm name of Crescent Coal Company, appellee, a manifest error hath happened, to the great damage of said Louisville & Nashville Railroad Company, as by its complaint appears, we being willing that error, if — hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the Sixth day of August, next, in said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of
488 the United States, the ninth day of July, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America, the one hundred and thirty-seventh.

[Seal United States of America, Eastern K't'y Dist. Court.]

JOHN W. MENZIES,
Clerk of the Circuit Court of the United States for the Eastern District of Kentucky, at Frankfort.
By CHAS. N. WIARD,
Deputy Clerk.

Allowed July 10th, 1912, by
J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

1912, July 10, filed in office.
Att:
R. L. GREENE, *C. C. A.*

489 Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company, Appellee.

The above-entitled matter coming on to be heard upon the petition of the appellant therein for a writ of error from the Supreme Court of the United States to the Court of Appeals of the State of Kentucky, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter—

It is ordered that a writ of error be, and is hereby, allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is hereby, approved.

J. P. HOBSON,
Chief Justice of the Court of Appeals of Kentucky.

1912, July 10, filed in office.
Att:
R. L. GREENE, *C. C. A.*

490 At the same time, to-wit, July 10, 1912, the appellant, Louisville & Nashville Railroad Company, filed its Writ of Error Bond approved by the Chief Justice, which said Bond is in words and figures following, to-wit:

Court of Appeals of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
v.
JOE HIGDON, Doing Business under the Firm Name of Crescent Coal Company, Appellee.

Writ of Error Bond.

Know all men by these presents, that we, the Louisville & Nashville Railroad Company, as principal, and Citizens Trust & Guaranty Co. of W. Va. and W. L. Mapother, as sureties are held and firmly bound unto Joe Higdon in the sum of Five Thousand Dollars to be

paid to the said Joe Higdon. To the payment of which well and truly to be made, we bind ourselves, and each of us jointly and severally, and our, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this 9th day of July, A. D. 1912.

Whereas the above-named plaintiff in error, Louisville & Nashville Railroad Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Appeals of Kentucky, the highest court in said State.

Now, herefore, the condition of this obligation is such that if the above-named plaintiff in error, Louisville & Nashville Rail-
491 road Company, shall prosecute its said writ — error to effect, and answer all damages and costs, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER, [SEAL.]
First Vice President.
CITIZENS TRUST & GUARANTY CO. OF W. VA., *Surety.*
By J. F. GAUVREAU, *Att'y in Fact.*
W. L. MAPOTHER, *Surety.*

Sealed and delivered in the presence of
J. P. HOBSON.
Chief Justice Court of Appeals, Kentucky.

Filed July 10th, 1912.

1912, July 10th, filed in Office.
Att:
R. L. GREENE, *C. C. A.*

492 Afterwards, to-wit, on July 15, 1912, the appellant filed in the office of the Clerk of the Court of Appeals of Kentucky, the Citation herein with acceptance of service thereon, which said Citation is attached hereto and returned herewith as part of this transcript and is as follows:—

493 UNITED STATES OF AMERICA.
—— *District of Kentucky,*
Sixth Judicial Circuit, ss:

To Joe Higdon, Greeting:

You are cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, in District of Columbia, on the sixth day of August, 1912, next, pursuant to a writ of error filed in the Clerk's office of the Court of Appeals of Kentucky, wherein the Louisville & Nash-

ville Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this July 10th, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States of America, the one hundred and thirty-seventh.

J. P. HOBSON,
Chief Justice Court of Appeals of Kentucky.

Service of citation accepted July 12th, 1912.

CLAY & CLAY,
Attorneys for Joe Higdon.

Filed July — 1912.

——— ———,
Clerk Court of Appeals of Kentucky.

1912, July 15, filed.
Attest:
ROB'T L. GREENE, *C. C. A.*

494 COMMONWEALTH OF KENTUCKY,
Court of Appeals, set:

In obedience to the commands of the attached Writ of Error, I herewith transmit to the Supreme Court of the United States a complete transcript of the entire record with all things touching the same in the case of Louisville & Nashville Railroad Company, appellant and plaintiff in error, vs. Joe Higdon, doing business under the firm name and style of Crescent Coal Company, appellee and defendant in error, as the same appears from the records and files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol in Frankfort, Kentucky, on this 29 day of July A. D. 1912.

[Seal Kentucky Court of Appeals.]

ROB'T L. GREENE,
Clerk of the Court of Appeals of Kentucky.

Fee for this trans'pt $187.45.

Endorsed on cover: File No. 23,323. Kentucky Court of Appeals. Term No. 748. The Louisville & Nashville Railroad Company, plaintiff in error, vs. Joe Higdon, doing business under the firm name of Crescent Coal Company. Filed August 5, 1912. File No. 23,323.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 748.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
Plaintiff in Error,

vs.

JO HIGDON, doing business under the name of the
CRESCENT COAL COMPANY
Defendant in Error.

Motion To Dismiss and Affirm, and Brief in Support Thereof.

Comes now the defendant in error, Joe Higdon, doing business under the name of the Crescent Coal Co., and moves the Court to dismiss the writ of error in this case for want of jurisdiction, because the judgment of the Court of Appeals of Kentucky, to which said writ of error was directed, shows on its face that the record does not present a case of Federal jurisdiction; and also because it appears that the right, title, privilege or immunity now claimed was not specially set up or claimed at the proper time or in the proper way; or if the writ of error shall not be dismissed, that the judgment of the said Court of Appeals of

Kentucky be affirmed, on the ground that, although in the opinion of this court the record may show that this court has jurisdiction, it is manifest that the said writ of error was taken for delay only, and that the questions on which the jurisdiction depend are so frivolous as not to need further argument. The defendant in error further moves the Court to award him damages upon the supersedeas bond herein.

JAS. W. CLAY,
Counsel for Jo Higdon.

BRIEF OR ARGUMENT.

A full and complete statement of the facts of this case may be found in the opinion of the Court of Appeals of Kentucky, delivered on the first appeal to that court. This opinion may be found in 143 Kentucky Reports, at pages 73 to 85, Crescent Coal Co. vs. L. & N. R. R. Co., and a copy thereof is attached hereto as Appendix I.

It will be observed that nowhere in this opinion is there any Federal question discussed or passed upon, nor was any Federal question raised or presented in the Henderson Circuit Court, or in the Court of Appeals of Kentucky, upon the first trial in either court. The Henderson Circuit Court on the first trial, after hearing the case on its merits, dismissed the petition. The Court of Appeals of Kentucky, in the opinion above referred to, reversed the Henderson Circuit Court, and remanded the case for a new trial in conformity with that opinion.

Upon the return of the case to the State Circuit Court, the defendant tendered and moved to file two amendments to its answer, elaborating its former defense as presented in its original answer, and also attempting to raise two Federal questions, not raised on the first trial of the case. The Circuit Court overruled the defendant's motion to file these amendments, and proceeded to a trial of the case in strict conformity with the opinion of the Court of Appeals of Kentucky. On this second trial of the case

in the Circuit Court, a verdict and judgment in favor of the plaintiff was rendered, and an appeal prosecuted to the Court of Appeals by the Louisville & Nashville Railroad Co.

On the second appeal, the Court of Appeals of Kentucky reviewed its former opinion rendered on the first appeal, set forth in detail the questions decided by it on the first appeal, and held that the Circuit Court had proceeded in conformity with the mandate of the Court of Appeals, and that no error had been committed by it, and the judgment of the Circuit Court was therefore affirmed. This second opinion may be found in 149 Kentucky Reports, page 321 to 327, and also in 148 S. W. R., 27 to 30. A copy thereof is herewith submitted as Appendix II.

In the first amended answer tendered as above shown, the defendant attempted to inject into the case the defense, that the rate of $4.00 per car which the Court of Appeals said in its first opinion should be applied to the plaintiff, "was not adequate compensation for the service demanded by appellee, and that to compel appellant to perform the service at that rate would be to deprive it of its property without due process of law, and to deny it the equal protection of the laws, contrary to the fourteenth amendment of the Constitution of the United States."

That portion of the fourteenth amendment, "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," relates to the action of the State by legislative procedure, or judicial construction or application of some legislative act. If the State of Kentucky, by constitutional provision or legislative act, had attempted to fix a rate for the service in question, or had delegated to any of its ministerial boards or commissions such authority, and they had attempted to fix such rate, then the question here attempted to be raised would unquestionably confer upon the Supreme Court of the United States jurisdiction to review such action of the

State authorities. Here, however, the record shows, and the Court of Appeals of Kentucky finds as a fact, that this rate was not fixed by State authority, but was fixed and established by the Plaintiff in Error. We quote from the second opinion of the Court of Appeals the following:

> "As to the contention that the rate of $4.00 a car is below the cost of service and therefore confiscatory, and constitutes the taking of property without due process of law, it must be borne in mind that the rate was not fixed by the Railroad Commission, but was fixed by appellant itself.
>
> "The railroad company may not fix its own rates, and then complain of the fact that they are confiscatory. In our former opinion we simply held that, as appellant was engaged in furnishing cars for other shippers within the same territory at a rate of $4.00 a car, it was bound to furnish the same service to appellee at the same rate. This did not impose upon appellant the burden of continuing a rate that was less than the actual cost of the service. It had the right at any time to change the rate, subject to the limitation that the change should affect all shippers alike. It could not establish a certain rate for a certain service and deny to any one similarly situated and entitled to such service the benefit of such rate. Where a railroad company fixes a rate for a certain service, it will not be heard to say that the rate was proper so far as certain shippers were concerned, and confiscatory as to others who are similarly situated and entitled to the same service. To so hold would nullify our constitutional provisions with reference to discrimination. We therefore conclude that to hold appellant liable in this case is in no sense to deprive it of its property without due process of law."

Thus it will be seen that the State has placed no burden whatever upon the railroad company, and if there be any burden, it is self imposed, and voluntarily assumed. The relief from the alleged unjust burden lies with the defendant. If the cars cannot be furnished and the transportation service in question cannot be performed between industries in the Henderson,

Ky., terminals at a rate of $4.00 per car, and a reasonable profit realized therefrom, then it has, and is expressly given the right to stop the service altogether or increase the rate. It has, and has always had and been given, such right. When it stops the service for others, it may stop the service for the plaintiff; when it increases the rate to others, it may increase the rate to the plaintiff; but when it did, and as long as it continues to perform the service and charge $4.00 per car to others, it was bound to, should have, and must perform the service and charge the same rate to the plaintiff. That is all either the first or second opinions of the Court of Appeals of Kentucky holds. This does not present a question of deprivation of property by the State, without due process of law, or a denial by the State of the equal protection of the laws, and therefore does not present a question for Federal review.

As to the defense, which the defendant attempts to interpose by its second amended answer,—that to require the defendant to perform the service in question, or making it liable for its failure so to do, imposes an unnecessary and unreasonable burden upon the interstate commerce business of the railroad company, the same argument applies. Full relief from that burden was, and is, in its own hands.

If this were not true, however, the United States Constitution confers no power upon Congress to regulate, nor has Congress, by the Act to Regulate Commerce, or any other Act, ever attempted to regulate or control such commerce as that in question here. The plaintiff is a resident of the city of Henderson, Kentucky; the defendant is a Kentucky corporation, with an office in Henderson County, Ky.; the City of Henderson is located wholly in Kentucky, and the service demanded, and which the Court of Appeals held should have beeen performed, was not only intrastate service, but was even more restricted than that, it being intra-urban, confined strictly to the limits of the

City of Henderson, Kentucky, and none of them extended beyond. In passing on this question the Court of Appeals said:

> "Nor does the second amended answer present a defense. The service to which appellee was entitled was wholly within the State of Kentucky. The shipments were intra-state shipments. The interstate commerce business of appellant was in no way involved. Appellant was as much bound to obey the Constitution and the laws of this State with reference to intrastate shipments as it was the acts of Congress with reference to interstate shipments. It could not escape its obligations under either law upon the theory that obedience thereto would impose upon it a burden with respect to the other. It has never been regarded as a burden on interstate commerce to require a carrier to obey the State Constitution with reference to purely intrastate shipments. The contention is certainly novel that to perform a service wholly within the State at a given rate for certain shipments is altogether proper, while the performance of the same service for another shipper similarly situated imposes an unnecessary and unreasonable burden upon the interstate commerce business of the railroad company."

We further contend, that this court is without jurisdiction for the reason that it does not appear that the right, title privilege or immunity now claimed was specially set up or claimed at the proper time or in the proper way.

This action was instituted August 27th, 1908. The defendand filed a demurrer to the jurisdiction of the court, which was overruled; it then filed a demurrer to the petition, which was likewise overruled. On Oct. 11 it filed its original answer,, raising issues of fact as well as of law. A trial of the issues was had in the Circuit Court, and the case went to the Court of Appeals. That court heard the case, determined it upon its merits, and handed down an opinion covering every quesion that had been raised. It held that the defendant should have furnished cars and transported the same when loaded with coal from the plant of the Keystone mine, inside the terminal limits of Henderson,

Ky., to industrial plants within such limits at its established rate of $4.00 per car, and that it was liable to the plaintiff in damages for its failure in this respect; the case was then remanded to the Circuit Court for trial for the purpose of having a jury assess the damages, or, in other words, for an accounting. Up to this time no plea had been interposed raising or attempting to raise any Federal question whatever, and no Federal question was passed upon by the Court of Appeals. Every legal question presented by the issues was passed upon by the Court of Appeals, and the case was remanded for trial by jury to determine the amount plaintiff was entitled to recover. Upon the return of the case to the Circuit Court, and two years after its original answer had been filed, it presented the two amendments in question and moved to file the same. This motion was overruled, upon what ground the record does not show. They were not filed, and the case was tried upon the original issues, with the result that a verdict was rendered in favor of the plaintiff.

We submit that after a case has been tried on its merits, decided by the lower court upon the issues raised, and reversed by the State court of last resort, and remanded to the lower court for proceedings in conformity with the opinion, for the purpose of assessing and awarding the damages sustained, or for an accounting, then such opinion becomes the law of the case, by which the trial court is bound, and it is then too late for the defendant to raise a Federal question not raised upon the former trial.

In the case of Union Mutual Life Insurance Company vs. Kirchoff, 169 U. S. 193, a motion to dismiss was sustained by this Court upon this ground, the proceedings in which were very similar to those in the case at bar. It was there held:

> "A Federal question raised after the case has been decided on the merits by the Supreme Court of the State, and remanded to a lower court merely for an ac-

counting, is raised too late for the purpose of a writ of error to this court, where it does not arise on the accounting itself, but by a motion to amend the answer by setting up the Federal question."

As in the case just cited, so in the case at bar, the effort was made to raise the Federal question by tender of amended answers after the legal rights of the parties had been fixed and determined by the Supreme Court of the State. In both cases the only thing for the lower court to do, was to ascertain and adjudge the amount due.

See also:

Yazoo, etc., R. Co. vs. Adams, 180 U. S. 1.

Western Electrical Supply Co. vs. Abbeville Electric Light & Power Co., 197 U. S. 299.

In Hopkins vs. Adam Roth Grocery Co., 105 Ky. 357, the Court of Appeals of Kentucky said:

"The legal principles determined on the first appeal of a case are not merely precedents for the guidance of this court on a second appeal of the same case. But the law as at first determined,—right or wrong,—is the law of the case, and must control, not only the lower court upon a return of the case, but also this court on any subsequent appeal."

In Thompson vs. Louisville Banking Co., 55 S. W. R., 1080, the Court of Appeals of Kentucky held:

"The opinion rendered in these cases is the law of the cases, however erroneous it may have been. The fact that it was overruled in a subsequent case betewen other parties, destroys it as a precedent in other cases, but it is nevertheless binding on the parties to this controversy. The rule is elementary that a matter once litigated and determined finally can not be relitigated between the same parties. When the cases were returned to the court below, that court had no alternative but to obey the mandate of this court, and upon appeal from that judgment this court is as much bound by that mandate as the court below was. If this were not so, litigation would be interminable and a judgment of this

court finally settling the rights of the parties would be only the starting point for new litigation."

So in this case. Whether the relief sought by plaintiff, if granted, deprived the defendant of its property without due process, or denied it the equal protection of the law, or imposed burdens in conflict with the interstate commerce provision of the Constitution, all presenting constitutional questions, could have been raised in the first instance on the first trial of the case in the Circuit Court. When the Circuit Court overruled the demurrer, and on final trial dismissed the petition of plaintiff, and the Court of Appeals reversed the case, holding in effect that the action of the lower court in overruling the demurrer to the petition was right, but its action in dismissing plaintiff's petition on final trial was wrong, that settled and put at rest the plaintiff's consitutional right to the relief sought, just as much as if the court had in express language so held. The fact that it was not in express terms passed upon, or in express terms presented in argument, does not affect the question. If the defendant failed to present the question, that was its fault, it had its day in court, and is estopped thereafter to do so. The plaintiff's legal rights were settled by the first judgment of the Court of Appeals: every question of law, those actually raised as well as those presented by the amendments tendered, were put at rest by that judgment. The case was remanded for a new trial solely upon the issue of the amount of damages or criterion of recovery. The only legal questions that could have been properly considered by the Circuit Court upon the return of the case, or which were open for consideration by it, were such as gathered around or were involved in the determination and fixing of the amount to be recovered.

There was no plea of a Federal question in the record. The Circuit Court, the only court under the Kentucky practice where an original pleading could be filed, refused the amend-

ments tendered, and they were not filed. The grounds for its refusal do not appear of record, nor was it necessary for the Circuit Court to set forth its reasons therefor. It was only necessary for it to, and it did, overrule the motion to file. The Circuit Court may have overruled the motion to file the amendments upon the ground that they were not verified as required by Section 116 of the Civil Code of Kentucky:

Armstrong vs. Foley, 12 Ky. L. R. 802.

Park vs. McReynolds, 111 Ky. 651.

Or upon the ground that no showing was made by affidavit or otherwise, why the issues presented were so long delayed.

Asher vs. Uhl, 27 Ky. L. R.938.

Or, it may have thought that to permit the amendments to be filed at that late day would be an abuse of discretion:

Donnelly vs. Pepper, 91 Ky. 363.

Louisville Underwriters vs. Pence, 93 Ky. 96.

Or, it may have been upon the ground that it was bound by the opinion of the Court of Appeals; or, upon the ground that they presented no legal defense. All or any of these grounds were sufficient to justify its action in overruling the motion to file the amendments tendered. When the action of the Circuit Court in declining the amendments came before the Court of Appeals for review, that court held the Circuit Court did not err in overruling the motion to file. It was only necessary for the Court of Appeals to approve this action of the Circuit Court, and the fact that it may have done so on one ground, in no sense destroys the existence of others. The opinion of the Court of Appeals of Kentucky is not a part of the judgment, and when we look to the judgment of that court it simply adjudges that no errors were committed and the judgment of the Circuit Court was affirmed. The judgment of the Circuit Court was that the amendments raising the Federal question could not be filed at that time. That question, therefore, was not in the record. It

is true, the Court of Appeals of Kentucky, in its opinion in the case, discusses the question and says the amendments did not present a defense, and that the Circuit Court therefore properly rejected them, but if it had been necessary the Court of Appeals would also have unquestionably held that the question could not properly have been raised at that time. It had the ruling of this Court to sustain its action, to say nothing of the numerous precedents of its own. The Court of Appeals held that the trial court did not err in refusing to permit the amendments to be filed; if this court is of the opinion that the trial court did not err in refusing to permit the amendments to be filed, whether upon the ground that they presented no defense, or whether upon the ground that they were tendered too late, and after the case had been remanded for an accounting, in either event the amendments then are not part of the record,—there is no Federal question to be disposed of, and the motion to dismiss should prevail.

MOTION TO AFFIRM.

It seems to us that the mere statement of the case as found in the opinions of the Court of Appeals of Kentucky, which is fully borne out by the record, is sufficient to brand as without any merit whatever the defenses which the plaintiff in error attempted to raise by the amendments in question. These issues were clearly a mere afterthought, presented after the case had been decided, and after the defendant had failed on the merits. Under the facts, the plaintiff in error can not expect a favorable decision, reversing and remanding the case on final hearing. That it will be finally affirmed we are confident, and we submit that it is evident from the record that the writ of error was taken for delay only, and that the questions attemped to be presented, and upon which the jurisdiction depends, are frivolous, and require no argument.

Under Section 764, Civil Code of Kentucky, ten per cent.

damages is awarded on a supersedeas bond upon affirmance of judgment by the Court of Appeals. While not binding upon this Court, yet it is discretionary with the Court to allow damages in this case. We ask that this discretion be exercised in favor of the defendant in error.

Respectfully submitted,

JAS. W. CLAY,

Counsel for Jo. Higdon.

Of Counsel—

J. F. CLAY,

A. Y. CLAY.

APPENDIX I.

CRESCENT COAL CO. vs. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky, March 18, 1911.)

The appellant, Crescent Coal Company, is the business name assumed by Joe Higdon, who in 1908 was engaged in buying and selling coal in the city of Henderson. The appellee, Louisville & Nashville Railroad Company, was at the time, and is, a corporation organized under the laws of Kentucky and engaged in the business of a common carrier of passengers and freight. Its main line of road runs into and through the city, and in addition to its main line it operates and controls what is called a "belt line," running from its main line in two directions through the city. Leading from its main and belt line, there were a number of spur tracks that ran into various industrial plants in the city of Henderson, situated near its main and belt lines of road. These spur tracks were used for the purpose of transporting freight to and from these industrial plants, and were operated by the company as a part of its line of road. The Keystone Mining & Manufacturing Company was engaged in the operation of a coal mine in the ctiy of Henderson, and was connected with the main or belt line by a spur controlled and operated by the appellee company.

In April, 1908, Higdon, in the name of the Crescent Coal Company, conceived the plan of supplying the industrial plants in the city of Henderson that had spur connections with the main or belt line of the appellee company, with coal mined from the Keystone mine. His purpose was to have cars furnished by the appellee company loaded with coal at the time, and then transferred by the appellee company to the industrial plants in Henderson that had spur connections. With this object in view he entered into a contract with the Keystone Company, by the terms

of which he was to be furnished by it during the year beginning July 1, 1908, 20,000 tons of coal, which it was stipulated in the contract should be delivered to him on the spur track at its mine. Another contract made in May, 1908, gave him the right with certain conditions to sell the output of the mine in excess of 20,000 tons. After making these contracts with the Keystone Company, he contracted with various industrial plants having spur connections with the line of the appellee company to deliver to them at their plants, in car load lots, at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to the appellee company to furnish him cars at the Keystone Company's mine to be loaded with coal and hauled by it to the industrial plants, and proposed to pay for the services $4.00 per car, which would be about ten cents per ton. The appellee company refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish cars but would charge for the service 50 cents per ton. This offer, which was kept open until August 13, 1908, Higdon refused to accept, and on August 13th the appellee company informed him that it would not furnish cars for this service at any price. Thereupon Higdon brought this suit against the appellee company, setting up his contracts, and the action of the appellee in preventing him from fulfilling them, and sought to recover damages to compensate him for the loss he had sustained. The action was brought on the ordinary, or common-law, side of the docket, but on motion of the appellee company was transferred over the objection of the appellant to equity, and, upon hearing, the petition was dismissed.

A number of legal questions are presented by the record, and we will endeavor to dispose of such of them as seem essential to a solution of the matters in controversy. The first, and perhaps the most important, question is: Was the appellee company under a duty as a common carrier of passengers and freight to ren-

der this service?

The evidence for appellee conduces to show that the coal mine and the industrial plants located in Henderson to which Higdon desired to deliver coal were all located within what are called the "switching limits" of the appellee company. It is therefore said that it should not be treated as a common carrier or charged with the duty of transporting freight as a common carrier from one point within these limits to another point within them. A common carrier, such as the appellee company was, may undoubtedly have what may be called yard facilities, including switches, spurs, and side tracks for its convenience in the handling, storing and distribution of its cars and freight, and it would not be obliged as a common carrier to transport from one point to another in these yards, or on these spurs or switches, freight for the convenience of shippers who might desire to have freight hauled from one point on a switch or spur in the yard to another point in the yard. In the use of tracks laid in its yards for its own convenience in handling, storing, and distributing cars and freight, a common carrier cannot fairly be said to be engaged in the business of a common carrier in the sense that it must receive and deliver as at other points on its line of road freight or passengers. A rule like this would impose an unreasonable duty upon a common carrier and unnecessarily hinder and interfere with the conduct of its business. It is essential in the operation of railroads that they should have at terminals, and other places where the business requires it, yards and facilities that they may use in the conduct of their business, in such a way as not to be inconvenienced by the necessity of receiving and unloading goods for shippers. But we are not inclined to treat what the appellee company terms its "switching limits" in the city of Henderson as coming within the meaning of yards and terminals, such as we have described. The spur tracks to the coal mine and the industrial plants were

not constructed, nor were they operated, for the convenience of the appellee company in handling, storing and distributing its cars, engines, and other property. As we will presently show, they were constructed and were being used as a part of its railroad system, in carrying freight for compensation to and from the plants connected with its main line of road by these spur tracks. It is true these spur tracks were within what is called its "switch limits" and extended to factories and mills situated close to its line of road; but we regard as wholly immaterial, in the consideration of the question before us, the length of the spur track, or the kind of business establishments it connects the line of road with. Nor do we consider it a matter of any consequence how close together spur tracks, such as these, are located, or whether they are upon one part of its line or another. Whether they run to factories or mines in cities or towns, or to industrial plants in country districts, whether they are long or short, or close together or widely separated, they are to be considered a part and parcel of the system constructed and operated in its business as a common carrier, and the public have an interest in their conduct and operation that the carrier must respect. A railroad company owes to establishments connected with its line of road by these spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for transportation to one as it is to the other. It must serve all alike. Nor can a railroad company arbitrarily and without any relation to the use to which it is put designate a part of its track or system as "yards or switching limits" and then say that it owes no duty as a common carrier in this district except such as it may choose to assume, or say that it will or not, as suits its pleasure or convenience, perform service as a common carrier in this territory. A railroad company engaged in the general business of a common carrier can-

not without regard to the convenience of the public classify or divide its trackage into divisions or parts and say that on one part it is a carrier and on another it is not. In the discharge of its duties to the public as a common carrier a railroad company may establish reasonable depots or places at which it will receive and deliver freight, and cannot be required to receive or handle it at other places; but it must use for the public convenience all the tracks set apart by it for the transportation of freight, and treat without favor or discrimination all persons offering to it freight for carriage. The spur tracks to these various plants in Henderson were no more a part of its "yards or switching limits" than would be a spur track that connected its main line in a country district with a mill or factory.

It is shown by the evidence that the appellee company in 1908 and for a number of years prior thereto had been in the habit of transporting car loads of freight from industrial plants in Henderson with spur connections to other industrial plants in Henderson with spur connections, but that it had never performed this service for the Keystone Company. For example, it would haul a car load of corn from an elevator, connected with its belt or main line by a spur track to a mill connected with its belt or main line by a spur track; but it would not haul a car load of coal from the mine to either the elevator or the mill. In explanation of this practice, and for the purpose of showing that it involved a different character of service from that sought by Higdon, it attempted to show, and did so do by its traffic agents, that the service it performed in hauling products from one industrial plant to another, such as from the corn elevator to the mill, was merely auxiliary or incidental to a transportation service that preceded or followed this local movement. Or, in other words, when it hauled for a nominal charge a car load of corn from the elevator to the mill to be converted into foodstuff of some kind, this foodstuff would necessarily be sold to parties

outside of Henderson, and therefore it would get what it calls a transportation charge for hauling the food product from the mill at Henderson to the place it was shipped. And so it would be compensated in the transportation haul for the service it rendered in switching the cars from the elevator to the mill at a nominal price. It is said, however, that if coal was hauled from the Keystone mine to a factory, to be there consumed, the carrier could not get another haul out of this coal or the substance to which it was reduced, and therefore it had the right to decline to render in the transportation of coal the character of service that it rendered in the transportation of corn. Looking at this question from the standpoint of the traffic manager of the appellee company, it doubtless presented to his mind sufficient reasons why the discrimination should be made. But, when considered in relation to the duties a common carrier owes to the public, it was wholly unjustifiable. A common carrier may under certain conditions hold itself out to the public as being a common carrier of certain articles of freight, and, if it was only engaged in the carriage of specified articles, it would not be under any obligation to carry other things. If it carried for every person, who offered it, the articles and things that it held itself out to the public as a carrier of, it could not well be said to be guilty of discrimination. Hutchinson on Carriers, vol. 1, sections 59, 90, 144. But, as the appellee company was engade in the business of carrying coal, as well as all other articles of merchandise and freight offered to it, it had no right to make any discrimination between shippers, and was obligated to carry for all persons all classes and character of freight offered to it. Bassett & Stone v. Aberdeen Coal & Mining Co., 120 Ky. 728, 88 S. W. 318, 27 Ky. Law Rep. 1122. The argument is further made that it had persistently and uniformly declined to haul coal from this mine to places in Henderson, and this was well known to Higdon when he made the contracts referred to; but this cus-

tom did not confer upon it the right to continue the discrimination. That it had never engaged in the business of carrying coal in the manner desired by Higdon did not under the circumstances of this case authorize it to refuse to render the service when demanded. No length of time, or manner of treatment, or habit of dealing, will discharge a common carrier from the obligation to furnish to the public the service it is engaged in performing. The appellee company could not transfer between mills and factories corn, wheat and other articles, and refuse to transfer under the same conditions coal.

It follows from these conclusions that the appellee company was not justified in refusing to render the service requested by Higdon.

The next question is: What rate did it have authority to charge for his service? In April, 1908, the appellee company published and issued a book containing its tariff rates. In this book we find the following: "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Kentucky, terminals, but where any such service is performed as an accommodation, a charge of two dollars per car plus two dollars for car rental, shall be assessed." This tariff rate was in force from May 4, 1908, until after July, 1909. It was this rate that Higdon demanded that the appellee company should charge for the service he requested. The railroad company, however, insists that this tariff rate was not intended to and did not embrace the character of service Higdon desired. Its general traffic manager testifies that this provision in its tariff sheet was made for the sole purpose of fixing a rate at which it would transfer cars between warehouses or industries that it had hauled from other points to Henderson, or that were loaded at Henderson for shipment to other places. For example, if a car load of freight was shipped from Memphis, Tenn., to the

Henderson mills at Henderson, it would charge the regular transportation price from Memphis to its depot in Henderson, and in addition $4.00 for delivering the car from the depot to the Henderson mills on the spur track that ran into its establishment. Or, if a car load of food product was delivered to it by the Henderson mills on the spur in a car furnished for that purpose, it would charge $4.00 for carrying this car from the mills to its station in Henderson, and in addition charge the regular traffic rate for hauling it from there to the point of destination. In other words, the rate did not cover or contemplate a service in which a long haul did not follow or precede the movement of transferring the car to or from an industry in Henderson to its depot. Based on this theory, it is argued that the appellee company had not established or put in force any rate for the service demanded by Higdon at the time he requested it, and so it had the right to afterwards fix the rate at 50 cents per ton, which it did on July 13th. It is further said that this rate was reasonable, and, as Higdon declined to accept the service at this price, the company was thereby relieved from liability to him, unless he first brought the matter to the attention of the Railroad Commission and obtained from that body a ruling that the rate was not reasonable. If it were true that the appellee company had no fixed or established rate that covered this service at the time it was requested, we have no doubt of its right to fix a reasonable rate. We are further of the opinion that if the rate so fixed was reasonable, and Higdon declined to accept it, he would not have any cause of action against the company growing out of the state of facts set up in his petition. Whether it is a condition precedent to the bringing of an action for damages, on the ground that a rate fixed for a particular service is unreasonable, that the shipper must first obtain a ruling from the Railroad Commission, it does not seem necessary to decide in the view we have of the case.

It will be observed that the tariff rate previously quoted recites that the railroad company does not engage in the business of local switching between switches, tracks, warehouses, and industries in Henderson. But we have already determined that this declaration of what service it would perform did not authorize it to refuse to carry coal from the mine to the warehouses and industries in Henderson having spur connections. Therefore, so much of the provision as asserts that it will not perform this service need not be further noticed.

If the rate fixed was only for service rendered incidental to and in connection with a transportation service from which the company derived a benefit, and it was only ar reasonable rate when considered in connection with the additional rate charged for transportation service, there would be much force in the argument that it was not a reasonable rate for the carriage of coal from the Keystone mine to industries in Henderson, as the company would get no other compensation from this service. But, conceding this, we are unable to relieve the company from the condition in which it voluntarily placed itself under the mistaken assumption that it was not required to render at all such service as Higdon requested. Undoubtedly the appellee company had the right to classify freight and make a reasonable difference in its charges for different kinds of freight transferred to or from one industry to another in Henderson. Its authority to make this classification and to fix different rates was as extensive as its authority to classify and charge different rates for different kinds of freight transported from one point to another outside of Henderson. But, in publishing its tariff rates for the information and use of the public, it did not stipulate for different rates or make any classification. It said in substance that, when it transferred cars from one industry to another in Henderson, it would charge for the service $4.00. Having thus established and promulgated the rate it would charge without any attempt

to designate the character of freight it would transport for this charge, we do not feel authorized to interpret this rate as meaning that it would be charged for corn or flour or meal and not for coal, or to limit its application to any particular article. The appellee company is bound not only by its published rate, but by its course of conduct under this published rate. It is shown by the evidence that for many years and whenever requested it transferred from one mill or industry to another mill or industry in Henderson, connected by spur tracks with its main or belt line, car loads of freight of different kinds, and charged for this service the established rate. So if there was doubt about the meaning of this published rate, or the character of service it applied to, we find that the appellee company in its course of business construed it to mean that it was under a duty to, or at least would for the charge named, transfer loaded cars of freight from one factory or mill to another.

Under these facts it was plainly a discrimination against Higdon to refuse to perform the service for him at the price charged to others for a like service. Union aPcific R. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 896; Alabama & V. R. Co. v. Railroad Commission, 203 U. S. 496, 27 Sup. Ct. 163, 51 L. Ed. 289. If the appellee company had confined the transfer service to such service as was incidental to transferring cars of freight to and from its depot to mills and industries, there would be much force in the contention of counsel; but, as it did not pursue this course of conduct, we must treat the case as we find it and as it was made by the appellee company. The rate as published covered all service, and did not specify what character of freight it applied to, or make any distinction between corn and coal. If, under this rate, it was obliged to or did in its course of dealing transfer wheat, corn or other produce for certain persons from one point in Henderson to another, then it was obliged to perform this service upon the same terms

and conditions for all persons demanding it, without reference to the class of freight hauled. Constitution, Sections 214, 215. In the absence of a tariff or rate classification by the appellee company, we cannot say that a higher rate should be charged for hauling coal than should be charged for hauling corn or wheat. Further insisting upon its right to make a distinction between these articles and to support the contention that the published rate was not intended to and did not apply to coal, it is said that, when it hauled a car of freight from a mill or industry or from one industry to another in Henderson, it did so with the expectation that the freight so transferred would be converted into some article by the mill or industry receiving it and then shipped to points out of Henderson over its line, thus giving it what it calls a transportation haul or a haul out of which it would be compensated for the transfer service from factory to mill. This contention is entirely lacking in merit. It might be argued with as much force and relevancy to the issue that, as the mills could not be operated without coal, therefore it should haul coal from the mine to the mill so that produce might be manufactured that the appellee company could haul to points outside of Henderson.

We have examined the case of Dixon v. Central of Georgia R. Co., 110 Ga. 173, 35 S. E. 369, but do not find it applicable to the state of facts presented by the record before us. In that case the question before the court was whether or not the service was "ransportation service" or "switching service," and under the facts of that case it was held to be "transportation service,," and therefore the charge established for "switching service" was not applicable. In the case we have, our conclusion that the rate of $4.00 per car was applicable to the service demanded, although it is described in the tariff sheet as "switching service," is largely rested upon the ground that the company charged this rate to other shippers for a like service. In the Dixon case it does not appear that the question that influenced

our decision upon this point was before the court. If the question of the applicability of the tariff rate we have quoted was submitted to us freed from the construction given to it by the appellee company in its dealings with reference to the transfer of freight between other industries, we would say that it did not apply to the service sought by Higdon. It seems to us that the service Higdon desired was not "switching" but "transportation" service. It was the same kind of service that the appellee company would have performed if a car was loaded with coal at a mine at any point on its road, and then hauled to the customer to whom it was consigned. But the appellee company in its course of conduct treated what might properly be called "transportation service" as "switching service," and applied to it the rate it now claims is only applicable to "switching service." This being so, we again repeat that it cannot be allowed to make any discrimination between Higdon and others similarly situated.

Coming now to the amount of damages Higdon is entitled to recover: He had two contracts with the Keystone Company. In one contract, dated April 5, 1908, it agreed to furnish him during the year not more than 20,000 tons, and it was in reliance upon this contract and the $4.00 rate he had anticipated the appellee company would charge that he contracted to furnish to various industries about 14,000 tons. He also had other contracts to furnish coal to industries having spur connections, made before the contract with the coal mine, that it appears he could have filled with its coal. By the terms of the other contract, made in May, 1908, the Keystone Company appointed Higdon its sole agent in the city of Henderson to sell for it in the city coal in car load lots. But this contract stipulated that: "The first party (Keystone Company) does not obligate itself to furnish for or on account of the second party (Higdon) under this contract any given quantity of coal, nor shall it be required to furnish any coal which shall interfere with the supply of coal on

the local market in less than car load lots or by wagon loads. It being the mutual understanding that the first party shall supply its local trade by wagon delivery, shall fill the contract made with the Crescent Coal Company, signed by said Joe Higdon, and if then it has any coal on hand the said Joe Higdon shall have the refusal and the first party shall not have any right to ship it elsewhere if the second party should desire to use it under this contract in carload lots."

It will be observed that it was virtually optional with the Keystone Company whether it furnished Higdon any coal under the May, 1908, contract, and upon the record before us we do not think he is entitled to any damages under this contract, as it does not appear that on the faith of it he made any conracts that caused him to suffer any loss. On the cantract made in April, he is entitled to recover the difference between what it cost him to fill the cntracts he had made, whether before or after July 1, 1908, with industries having spur connections, and that he could have filled with coal from the Keystone mine between July 1, 1908, and July 1, 1909, and what it would have cost him to fill these contracts if he had obtained coal from this mine. As it appears that this mine ceased operations before July 1, 1909, the damage should be confined to the quantity of coal that the Keystone mine could have supplied under the contract before it ceased operations, and that he could have furnished in fulfillment of the contracts made with customers before that time. Upon these issues the appellant was entitled to a jury trial.

Wherefore the judgment is reversed for a new trial in conformity with this opinion.

APPENDIX II.

COURT OF APPEALS OF KENTUCKY.

Louisville & Nashville Railroad Company.....Appellant

Vs.

Joe Higdon, doing business under the name of Crescent Coal Company .....Appellee

OPINION OF THE COURT BY WILLIAM ROGERS CLAY, COMMISSIONER.—AFFIRMING.

Appellee, Joe Higdon, doing business under the name of Crescent Coal Company, was, during the year 1908, engaged in buying and selling coal in the city of Henderson. Appellant, Louisville & Nashville Railroad Company, is a common carrier. Its main line runs into and through the city of Henderson. In addition to its main line, it operates and controls a belt line. Leading from its main and belt lines and running into various industrial plants in the city of Henderson, are several spur tracks which are used for the purpose of transporting freight to and from these industrial plants, and are operated by the railroad as a part of its line of road. During the year 1908, the Keystone Mining & Manufacturing Company was operating a coal mine in the city of Henderson. This mine was connected with the main and belt lines of appellant's road by a spur which appellant operated and controlled. During the month of April, 1908, appellee contracted with the Keystone Mining & Manufacturing Company to furnish and deliver to him, on the spur track at its mine, 20,000 tons of coal. After making this contract, he contracted with various industrial plants having spur connections with the line of appellant company to deliver to them at their plants in coarload lots, at a stipulated price, a large quantity of coal. On July 1, 1908, he applied to appellant company to furnish him cars at the Keystone Company's mine for the purpose

of loading and hauling the coal to the industrial plants, and proposed to pay for the service $4.00 per car, or at the rate of about ten cents per ton. Appellant refused to furnish any cars for this service until July 13, 1908, when it notified Higdon that it would furnish the cars and perform the service at 50 cents per ton. Appellee refused to accept the service at that price. On August 13, 1908, appellant informed him that it would not furnish cars for this service at any price. Thereupon appellee brought this action against appellant to recover damages alleged to have been sustained by reason of appellant's failure to furnish him the service at the price of $4.00 per car. The case was transferred to equity, and, on final hearing, appellee's petition was dismissed. On appeal to this court, the judgment was reversed, and cause remanded for a new trial consistent with the opinion. Crescent Coal Co. v. L. & N. R. R. Co., 143 Ky. 73.

On that appeal it appeared that appellant in its printed and published rates, rules and regulations governing the handling of cars in the city of Henderson, had promulgated the following:

> "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Kentucky, terminals; but where any such service is performed as an accommodation, a charge of $2.00 a car, plus $2.00 for car rental, shall be assessed."

It was the contention of the railroad company on that appeal: (1) That appellee's cause of action was not determinable independently of a decision of the Railroad Commission adverse to the railroad company. (2) That the service demanded of the railroad company was not such a service as the law of public policy required it as a common carrier to perform, nor was it such a service that it engaged in or professed to engage in. (3) That the hauling of grain and milling products between mills and elevators at Henderson was entirely different from the intra-

urban transportation which appellee sought to require the railroad company to engage in. (4) That the railroad company published no tariff rate for intra-urban transportation at Henderson; that the tariff provisions relied on by the plaintiff applied exclusively to switching services, and the service demanded by the plaintiff was a transportation service in that the coal was mined at one point in the Henderson station, and was to be transported from that point to another point in the same station. (5) That even if the railroad company did haul grain and milling products at the rate of $4.00 per car, it was not required by Section 215 of the Constitution of Kentucky to haul coal at the same rate.

In holding these contentions of the railroad company without merit, the court, in its former opinion, laid down the following rules:

(1). In the discharge of its duties to the public as a common carrier, a railroad must use for the public convenience, all the tracks set apart by it for the transportation of freight and treat without favor or discrimination all persons offering to it freight for carriage.

(2). A common carrier may hold itself out to the public as being a carrier of certain articles; and if it is only engaged in the carriage of the specified articles, it is not under any obligation to carry other things.

(3). No length of time or manner of treatment or habit of dealing will discharge a common carrier when requested from the obligation to furnish to the public the service it is engaged in performing.

(4). A railroad company may, for its convenience in the handling, storing and distribution of its cars and freight, have yard facilities, including switches, spurs and side tracks, and it will not be obliged as a common carrier to transport from one point to another in such yards freight for the convenience of

shippers.

(5). A railroad company owes to establishments connected with its line of road by spur tracks the same duty that it does to establishments situated immediately upon its main line of road. It is under the same obligation to furnish facilities for the transportation to one as it is to the other. It must serve all alike.

(6). A railroad cannot arbitrarily and without any relation to the use to which it is put, designate a part of its track or system as yards or switching limits, and assert that it owes no duty as a carrier in this district except such as it may choose to assume. It can not classify or divide its trackage into parts and say that on one part it is a carrier and on another it is not.

(7). When a carrier publishes a rate it will charge for a certain service, it mush furnish to all persons demanding this service the same rate.

(8). If a carrier has no established rate that covers the service requested, it must fix a reasonable rate for such service.

(9). A carrier has a right to classify freight, and make a reasonable difference in its charges for different kinds of freight.

(10). A person sustaining loss by the failure of a carrier to transport freight tendered to it as its stipulated rate, may recover any amount lost to him on account of contracts made on the faith of this rate.

In remanding the case, the court held that on the contract made in April appellee was entitled to recover the difference between what it cost him to fill the contracts he had made, whether before or after July 1, 1908, with industries having separate connections, and that he could have filled with coal from the Keystone mine between July 1, 1908, and July 1, 1909, and what it would have cost him to fill these contracts if he had obtained the coal from this mine. The court further held that as it appeared that the Keystone mine had ceased operations before July 1, 1909, the damages should be confined to the quantity of coal that the

Keystone mine could have supplied under the contract before it ceased operations, and that appellee could have furnished in fulfillment of the contracts made with customers before that time.

On the return of the case, the railroad company offered an amended answer and a second amended answer. The trial court refused to permit these pleadings to be filed, but made them a part of the record by order of the court.

The second trial resulted in a verdict and judgment in favor of appellee for the sum of $3,137.10, and the railroad company appeals.

Appellant insists that the first and second amended answers tendered on the return of the case presented a defense to the action, and the trial court erred in refusing to permit them to be filled.

By the first amended answer, appellant simply elaborated certain averments in the second paragraph of its original answer to the effect that it was not its duty to engage in the business of transporting freight or passengers between points in the same terminal or station. In addition to these averments, the first amended answer contained allegations to the effect that the rate of $4.00 a car was not adequate compensation for the service demanded by appellee, and that to compel appellant to perform the service at that rate would be to deprive it of its property without due process of law and to deny it the equal protection of the laws contrary to the 14th amendment of the Consitution of the United States.

By the second amended answer, appellant pleaded that to require the performance of the service demanded by the appellee at Henderson, would impose an unjust and unreasonable burden upon the interstate commerce business of the defendant, in violation of Sub-section 3, Section 8, Article 1, of the Constitution of the United States.

As the averments contained in the first part of the first

amended answer are simply an elaboration of the defense presented by the second paragraph of the original answer, and as the court on the former appeal, in an opinion which is now the law of the case, held that they did not present a defense to the action, the further consideration of the first part of the first amended answer will be unnecessary. As to the contention that the rate of $4.00 a car is below the cost of service, and therefore confiscatory, and constitutes the taking of property without due process of law, it must be borne in mind that the rate was not fixed by the railroad commission, but was fixed by appellant itself. The railroad company may not fix its own rates, and then complain of the fact that they are confiscatory. In our former opinion, we simply held that as appellant was engaged in furnishing cars for other shippers within the same territory, at a rate of $4.00 a car, it was bound to furnish the same service to appellee at the same rate. This did not impose upon appellant the burden of continuing a rate that was less than the actual cost of the service. It had the right at any time to change the rate, subject to the limitation that the change should affect all shippers alike. It could not establish a certain rate for a certain service and deny to anyone similarly situated and entitled to such service the benefit of such rate. Where a railroad company fixes a rate for a certain service, it will not be heard to say that the rate was proper so far as certain shippers were concerned, and confiscatory as to others who are similarly situated and entitled to the same service. To so hold would nullify our constitutional provisions with reference to discrimination. We therefore conclude that to hold appellant liable in this case is in no sense to deprive it of its property without due process of law.

Nor does the second amended answer present a defense. The service to which appellee was entitled was wholly within the State of Kentucky. The shipments were intra-state shipments. The interstate commerce business of appellant was in no way

involved. Appellant was as much bound to obey the constitution and the laws of this State with reference to intra-state shipments as it was the acts of Congress with reference to interstate shipments. It could not escape its obligations under either law upon the theory that obedience thereto would impose upon it a burden with respect to the other. It has never been regarded as a burden on interstate commerce to require a carrier to obey the State constitution with reference to purely intra-state shipmens. The contention is certainly novel that to perform a service wholly within the State at a given rate for certain shipments is altogether proper, while the performance of the same service for another shipper similarly situated imposes an unnecessary and unreasonable burden upon the interstate commerce business of the railroad company.

As neither the amended answer nor the second amended answer presented a defense to the action, it follows that the trial court did not err in refusing to permit them to be filed.

From a careful consideration of the evidence, we conclude that it is amply sufficient to support the finding of the jury.

The instructions being in conformity with our former opinion, and there appearing no error in the record prejudicial to the substantial rights of the appellant, it follows that the judgment should be affirmed, and it is so ordered.

5

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

No. 322

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - Plaintiff in Error,

versus

JOE HIGDON (DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY), - - - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Objection to Motion of Defendant in Error to Dismiss and Affirm, and Brief in Support of Said Objection.

BENJAMIN D. WARFIELD,
MALCOLM YEAMAN,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

October Term, 1912.

No. 748.

LOUISVILLE & NASHVILLE RAILROAD COMPANY - - - - - - - *Plaintiff in Error,*

versus

JOE HIGDON (DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY) - - - - - *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

OBJECTION TO MOTION OF DEFENDANT IN ERROR TO DISMISS AND AFFIRM, AND BRIEF IN SUPPORT OF SAID OBJECTION.

The plaintiff in error, the Louisville & Nashville Railroad Company, objects to the motion of the defendant in error to dismiss the writ of error in this case, and also objects to the motion of the defendant in error to affirm the judgment of the Court of Appeals of Kentucky and to award damages on the supersedeas herein.

STATEMENT.

The necessary effect of the judgment of the court of Appeals of Kentucky in this case is to hold that a purely intra-urban transportation service is similar to a switching service, and that, under Sections 214 and 215 of the Constitution of Kentucky, it was the duty of the plaintiff in error to perform an intra-urban transportation service for the defendant in error, at the same rate charged for performing a switching service. The service demanded by the defendant in error was the hauling of coal from the private spur of the Keystone Mine, in the terminals at Henderson, Kentucky,—where said coal was mined,—to other spurs in said terminals, where said coal was consumed; whereas, the switching service performed by the plaintiff in error at Henderson was incidental to a transportation service to and from Henderson, for which a transportation charge was assessed. The judgment requires the plaintiff in error to engage in the business of intra-urban transportation, which it had never professed to engage in or held itself out as willing to engage in, but which it had expressly declared, in its tariffs, that it did not and would not engage in.

We contend, therefore, that Sections 214 and 215 of the Constitution of Kentucky, as construed by the highest court of this State, in this case, to require the plaintiff in error to engage in an intra-urban transportation service at Henderson, Kentucky, because the plaintiff in error was at said time engaged in switching freight at said point—said switching service being incidental to a

transportation service,—and to require the plaintiff in error to perform said intra-urban transportation service at the same rate as charged for a switching service, and for a rate less than the actual cost of said intra-urban transportation service, are in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they deprive the plaintiff in error of its property without due process of law and deny to said plaintiff in error the equal protection of the laws.

Furthermore, the private sidings of the plaintiff in error at Henderson were established for the purpose of affording the industries to which they are attached a convenient place to receive freight consigned from points outside of Henderson to said industries, and a convenient place at which said industries may load freight consigned to points outside of Henderson. The plaintiff in error has a freight depot and public team tracks at Henderson, and the private sidings in the Henderson terminals, including the one at the Keystone Mine, are accessories to said freight depot and public team tracks, or are merely private loading and unloading tracks built for the accommodation of industries having a sufficient volume of business to justify the expenditure of the cost of said private tracks. The judgment of the Court of Appeals of Kentucky in this case necessarily imposes upon the plaintiff in error the duty of performing a transportation service between said private spurs at Henderson and of furnishing facilities for such service, when the plaintiff in error, by its tariff, expressly declared that it did not and would not engage in such service. The plain-

tiff in error, as a common carrier, is not bound, under the law, to perform such a service, and the judgment of the Court of Appeals of Kentucky, requiring it to perform such service, deprives it of the reasonable control of its property and facilities and denies to it the right to make reasonable rules and regulations for the carrying on of its business as a common carrier and for the operation of its equipment as such. The necessary effect of the judgment, therefore, is to violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the Court of Appeals of Kentucky expressly holds that the service demanded by the defendant in error was a service that could be performed wholly within the State of Kentucky, and that the State has the right and power to require the plaintiff in error to perform the service, or respond in damages for failure to perform the service, even though the performance of the service by the plaintiff in error would give to intrastate shippers, as against interstate shippers, an unreasonable preference and would unreasonably interfere with the interstate-commerce business of the plaintiff in error and impose a direct burden upon such commerce. And in this respect the judgment is in violation of Subsection 3, Section 8, Article I, of the Constitution of the United States.

This action was brought in the Circuit Court of Henderson County, Kentucky. The case was first tried in that court in October, 1910, before the chancellor, upon the whole record, and a judgment was entered dismiss-

ing the petition of the plaintiff. The record does not show upon what ground the circuit court rendered judgment for the plaintiff in error, as no written opinion was filed in the record. An appeal was prosecuted from that judgment to the Court of Appeals, and said judgment was reversed in an opinion rendered March 18, 1911. The case, on being remanded to the Henderson Circuit Court, was by direction of the Court of Appeals transferred from the equity side of the docket to the ordinary side. The mandate of the Court of Appeals was filed September 5, 1911, that being the second day of the September term of the Henderson Circuit Court, and on the same date the plaintiff in error tendered and moved to file its first amended answer, and six days later tendered and moved to file its second amended answer, both of which were in amplification of the second paragraph of the original answer, and both were made a part of this record by special order of the court. The case, under the Civil Code, did not regularly stand for trial at that term of the Henderson Circuit Court. (Section 761, Subsection 2, Kentucky Civil Code.) In fact, it did not regularly stand for trial, on reversal, until the term of the Henderson Circuit Court beginning in January, 1912. But the plaintiff in error waived its right to have the case passed until the January (1912) term, and the case was tried at the September (1911) term. The judgment of the circuit court rendered at said term was affirmed by the Court of Appeals on June 21, 1912.

BRIEF.

It is contended for the defendant in error that the circuit court's action in overruling the motion of the plaintiff in error to file the amendments may have been upon the ground that they were not verified, or that no showing was made—by affidavit or otherwise—as to why the questions pleaded therein were not pleaded earlier, or that to permit the amendments to be filed at that date would be an abuse of judicial discretion.

We think it immaterial that the amendments were not permitted to be filed or what actuated the circuit court in so ruling. They were made a part of the record by order of the court, and the questions presented therein were fully considered by the Court of Appeals and were decided by that court, adversely to the plaintiff in error.

Section 134 of the Kentucky Civil Code of Practice provides as follows:

> "The court may, at any time, in furtherance of justice, and on such terms as may be proper, cause or permit a pleading or proceeding to be amended, by adding or striking out the name of party; or, by correcting a mistake in the name of a party (a), or a mistake in any other respect; or, by inserting other allegations material to the case (b); or, if the amendment do not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved (c). And if a proceeding taken by a party fail to conform in any respect to the provisions of this Code, the court may permit an amendment of such proceeding, so as to make it conformable thereto. And, if the allegations of a pleading be so indefinite or uncertain that the precise nature of

> the claim or defence is not apparent, the court may require the pleading to be made definite and certain by amendment (d). The court must, in every stage of an action, disregard any error or defect in the proceedings, which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect (e)."

Under the practice in said State, an objection to the filing of a pleading goes to its efficiency, as well as to its timeliness; and while it does not appear from the record upon what ground the circuit court acted in refusing to permit the amendments to be filed, it does appear that the Federal questions relied on by the plaintiff in error were asserted in the circuit court, not only in the amendments referred to, but were specially set up and relied on in the motion and grounds for a new trial and in the bill of exceptions signed and approved by the circuit court. Moreover, said claims were asserted in the Kentucky Court of Appeals, and that court expressly decided against those claims, thereby denying to the plaintiff in error the rights claimed under Section 1 of Amendment XIV. to the Constitution of the United States, and under Subsection 3, Section 8, Article I., of said Constitution.

The Kentucky Court of Appeals, in discussing the action of the circuit court in refusing to permit the amendments to be filed, said:

> "As neither the amended answer nor the second amended answer presented a defense to the action, it follows that the trial court did not err in refusing to permit them to be filed."

Thus, the highest court of the State recognized the claims asserted by the plaintiff in error under the Federal Constitution, and expressly denied to the plaintiff in error the right to rely upon them as a defense. In view of the decision by the Court of Appeals on that question, it is not to be presumed that the circuit court, in refusing to permit the amendment to be filed, acted on the ground that they were tendered too late, or that they were not verified. That question, however, is immaterial, as we shall later show, for no particular form or method is necessary in which the claim of Federal rights must be asserted,—it being sufficient if it appears from the record that such rights were specially set up and claimed in the State court and the rights so claimed were denied, all of which fully appears in the record in the case at bar.

The Court of Appeals, in the second opinion,—in answer to the contention that to require the plaintiff in error to perform the service of intra-urban transportation at the rate of $4.00 a car would deprive it of its property without due process of law,—refers to the former opinion, and says, in substance, that all that was held there was that, as the plaintiff in error was engaged in furnishing cars to other shippers within the same territory at the rate of $4.00 a car, it was bound to furnish the same service for the defendant in error, at the same rate; that where a railroad company fixes a rate for a certain service, it will not be heard to say that the rate was proper so far as certain shippers were con-

cerned, and confiscatory as to others who are similarly situated and entitled to the same service.

The tariff provision which the court construed to fix the rate is as follows:

> "The Louisville & Nashville Railroad Company does not engage in the business of local switching between switches, tracks, warehouses, or industries in the Henderson, Kentucky, terminals; but where any such service is performed as an accommodation, a charge of $2.00 a car, plus $2.00 for car rental, shall be assessed."

The evidence on the first trial in the circuit court showed that plaintiff in error was not engaged in the business of intra-urban transportation at Henderson or at any other point on its line of road, and that it had never held itself out to the public as willing to engage in such business. It also showed that while it had provided facilities at Henderson whereby grain might be moved from the Ohio River landing to elevators and mills in Henderson, and from the elevators in Henderson to mills in Henderson, to be converted into milling products and then shipped to the South and other points outside of Henderson, all such grain movements were incidental to a transportation movement, and that the service performed in handling grain in the manner indicated was necessarily a movement that preceded or followed a transportation movement and was, manifestly, different from the handling of coal from the mine of the Keystone Company to industries in Henderson; that, in the latter case, the coal was mined in Henderson and consumed there.

It further showed that the cost of handling coal from the Keystone Mine to industries in Henderson was as great as the cost of hauling coal from other mines in that section, from ten to fifty miles from Henderson, for which the plaintiff in error charged a rate of fifty cents a ton, which was a reasonable rate, and that a rate of less than fifty cents a ton would not afford the plaintiff in error adequate compensation for performing the service demanded by the defendant in error. The evidence also showed that the Keystone Mine was the only mine within ten miles of Henderson having connection with the railroad company; and that, when the defendant in error requested the plaintiff in error to perform the service in question, the plaintiff in error, having no tariff provision for said service, agreed to put in a rate of fifty cents a ton, which was a reasonable rate, and that the defendant in error declined to have the service performed at such a rate. The evidence on the second trial on the points mentioned was substantially the same as that on the first. Notwithstanding this evidence, the conclusion reached by the Kentucky Court of Appeals was that, inasmuch as the plaintiff in error performed a switching service on grain and milling products in Henderson,—which switching service, with rare exceptions, preceded or followed a transportation service,—the refusal of the plaintiff in error to transport coal mined in Henderson to the various side tracks in Henderson, for consumption there, was a discrimination, under Sections 214 and 215 of the Constitution of Kentucky; and that even if it did cost more to transport coal than the

rate of $4.00 a car—which was the rate for a switching service,—said rate, being applied to movements of grain and milling products, must be applied, under the Constitution of Kentucky, to coal, and must be considered to be a voluntary rate applicable to coal. The necessary force and effect of said judgment was to deprive the plaintiff in error of its property without due process of law, in that by said judgment the Court of Appeals of Kentucky required the plaintiff in error to perform a service that is was not, under the law, bound to perform, and fixed as a compensation therefor an arbitrary rate not provided for in the plaintiff in error's tariff, and so low as to be confiscatory. Furthermore, the Federal right claimed under the Fourteenth Amendment was specially set up and claimed in the State court and denied there, as shown by the opinion of the Court of Appeals.

With respect to the rights claimed by the plaintiff in error under Subsection 3, Section 8, Article I., of the Constitution of the United States, the opinion, in passing on that question, denies the claim asserted by the plaintiff in error and holds that, inasmuch as the movement in question is an intrastate movement, the plaintiff in error can not escape its obligations under the laws of this State; and that no regulation, by the State, of the intrastate traffic of the plaintiff in error violates any right which it has under the Federal Constitution. The language of the opinion on that point is:

> "It could not escape its obligations under either law upon the theory that obedience thereto would

> impose upon it a burden with respect to the other. It has never been regarded as a burden on interstate commerce to require a carrier to obey the State constitution with reference to purely intrastate shipments."

Thus the opinion holds that if it be true, as claimed by the plaintiff in error, that to require it to engage in the business of intra-urban transportation between private switches in the same terminals would so deplete its equipment for, and its power to serve, interstate shippers, as to discriminate unreasonably against such shippers in favor of intrastate shippers, still the State regulation is valid, and does not deprive the plaintiff in error of any right which it has under the Federal constitution; or, in other words, though such a regulation may encroach upon the power of the Federal government to regulate commerce among the States, the latter must yield to the State regulation. The policy of the State of Kentucky, as so announced through its highest court, is so arbitrary and broad as at once to challenge the attention of the authority vested with the power to regulate commerce among the States. That such a policy, as applied to the case at bar, encroaches upon the power of the Federal government to regulate commerce among the States and to control the instruments of such commerce, as well as deprives the plaintiff in error of its rights under the Federal Constitution, there seems to be no doubt.

The authorities relied on by defendant in error in making the contention that there is no Federal question in this case, do not, we submit, support said contention.

In Union Mutual Life Insurance Co. v. Kirchoff, 169 U. S. 103 cited, the Federal question was attempted to be injected into the case after a reversal, by the Supreme Court, of the judgment in the circuit court and the remanding of the case to the circuit court for the purposes of an accounting merely. On going to the Supreme Court of Illinois on the second appeal, that court held that it was a rule of that State that where a cause had been reviewed by that court, and remanded with directions as to the decree to be entered, a party, on a subsequent appeal, could not assign for error any cause that accrued or existed prior to the judgment on the first appeal; that all errors not assigned would be considered as waived, and could not afterward be urged. This court, in passing on the question of its jurisdiction, decided that, inasmuch as the Supreme Court of Illinois did not, on the second appeal, decide that the case was reopened as to the matters previously adjudicated, or as to the Federal questions which might have been, but were not, raised on the first appeal, it did not feel justified in taking jurisdiction of the case. In that case the Supreme Court of Illinois, on the second appeal, held itself bound by its previous decisions, and declined to enter on matters of defense which might have been availed of on the first appeal. All that this court held in that case, in addition to holding that the necessary effect of the decree and judgment was not against any right or title of defendant claimed under Federal authority, was that, as the Supreme Court of Illinois did not decide that the case was re-opened as to the Federal

questions attempted to be made, which might have been made on the first appeal, this court did not feel justified in taking jurisdiction, as those questions were not decided adversely to the claim of defendant. In fact, they were not decided at all, and they were never in the case.

In support of the opinion in the Kirchoff case, the court cited Oxley Stave Co.. v. Butler County, 166 U. S. 648, where the Oxley Stave Company sought to have reviewed a judgment of the Supreme Court of Missouri by writ of error from this court. It appeared, in that case, that no Federal question was made in either the court of original jurisdiction or the Supreme Court of Missouri. Nor was it inferable, from the opinion of the Supreme Court of Missouri, that that court was informed that any Federal right, privilege, or immunity was intended to be asserted. In fact, as appeared from the record, the State court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question. While the court dismissed the writ of error in that case, it was held that if it had appeared that the Supreme Court of the State had regarded the general allegations as asserting a Federal right or immunity, and had denied the claim so asserted, the jurisdiction of the Supreme Court of the United States would have been sustained. In concluding its opinion, the Court said:

> "If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear."

In Maxwell v. Newbold, 18 Howard, 511, which was a writ of error to the Supreme Court of Michigan, in holding that a writ of error could not be maintained, this court said:

> "The questions raised and decided in the State circuit court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly, this did not preclude the plaintiffs in error from raising the point in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not, depends upon the questions raised and decided in that court."

In Sayward v. Denny, 158 U. S. 180, in discussing this question, it was said that "the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way," and that "the right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed."

Obviously, if the Federal right is asserted in the State court and that court's attention is directed to the claim made under said right, the Federal question is raised, under Section 709 of the Revised Statutes; and whether or not the State court passes directly on the question, this court has jurisdiction, and a writ of error to the State court will lie. Assuredly the Federal question is raised where the right asserted under the Federal Constitution is specifically brought to the attention of

the court of original jurisdiction and to the attention of the highest court of the State, and the latter court—as in the case at bar—discusses the Federal questions and overrules the claims made thereon.

The case of Yazoo & Mississippi Ry. Co. v. Adams, 180 U. S. 1, relied on by defendant in error, is inapplicable to the case at bar. In that case it was held that the Supreme Court of the State, in deciding that it would not re-open the question involved in the first hearing, to let in the Federal defense presented by the new pleas, merely settled a question of State practice which this court could not review. However, in that case the court held that the judgment, in and of itself, necessarily involved the Federal question, and that the arguments urged by the defendant in error for holding that the Federal question was set up too late furnished a strong argument in favor of the position assumed by the railroad companies, that the Federal question was necessarily involved and must have been passed upon at the first hearing of the case. The argument of the defendant in error was, in substance, that the pleas were properly stricken out, because they presented no defense as the case then stood, by reason of the decision of the Supreme Court on the first appeal. The court held that, if that argument was true, it was strongly in favor of the position taken by the railroad companies, that the Federal question was necessarily involved on the first appeal.

The remaining case relied on by defendant in error, that of Supply Company v. Light & Power Company, 197 U. S., 299, not only is not an authority for the posi-

tion taken by defendant in error in this case, but supports the contention of the plaintiff in error. No other inference is deducible from the opinion in that case. In that case the motion was made in the circuit court to set aside the service and to dismiss the case for want of jurisdiction. The motion was sustained by the circuit judge, and the plaintiff appealed to the Supreme Court of South Carolina, and the judgment below was reversed and the cause remanded for further proceedings. The case having gone back to the circuit court, the defendant, by demurrer, renewed its objection to the jurisdiction, and set up as a ground therefor, for the first time, a Federal question. The demurrer was overruled and the case went to verdict and judgment on the merits, whereupon it was again taken by appeal to the Supreme Court of South Carolina. That court declined to express any opinion on the constitutional questions, and affirmed the judgment. The court merely held that the question of jurisdiction had already been determined and that it was not bound to re-examine it. And this court said:

> "This was, of course, a ground broad enough to sustain the judgment, and as the objection that the State statutes were inconsistent with the Federal Constitution was not raised until the case came on for the second hearing, it is plain that the Supreme Court could, in its discretion, treat it as coming too late to call for decision."

It is clearly inferable, from that opinion, that had the Supreme Court of South Carolina taken cognizance of the Federal question and passed on it, the question

would have been properly in the record, and the decision of the State Supreme Court would have been properly reviewable by this court on writ of error.

None of the cases relied on by defendant in error supports the contention that there are no Federal questions in the case at bar. In all those cases the Supreme Courts of the States to which the writs of error were directed refused to take cognizance of the Federal questions attempted to be raised on the second appeal, but decided that on the second appeal they were bound by the former decisions, and declined to enter on the matters of defense brought to their attention for the first time on that appeal. And this court, in sustaining said decisions, held that the Supreme Courts of the State could in their discretion treat the Federal questions as coming too late to call for decision, and in so deciding they were settling questions of State practice which this court could not review.

In Green Bay & Mississippi Canal Co. v. Patten Paper Co., 172 U. S. 58, this court said:

> "But no particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

To the same effect is Bridge Proprietors v. Hoboken Co., 1 Wallace, 116, where it is said:

> "The true and rational rule is that the court must be able to see clearly, from the whole record,

> that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied."

See, also, Roby v. Colehour, 146 U. S. 153; Powell v. Brunswick County, 150 U. S. 433; C., B. & Q. R. R. v. Chicago, 166 U. S. 226.

It has also been decided by this court that in determining whether any provision of the Constitution or act of Congress was relied on and a right claimed thereunder denied, the court will look to the opinion of the highest court of the State to which the writ of error is directed. (Philadelphia Fire Association v. New York, 119 U. S. 110; Gross v. United Mortgage Co., 108 U. S. 477; Murdock v. City of Memphis, 20 Wallace, 590.)

In Mallett, etc., v. North Carolina, 181 U. S. 589, the plaintiffs in error were indicted and tried in the county of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment. They appealed to the Superior Court. That court reversed the verdict and judgment, and granted them a new trial. From the judgment of the Superior Court the State appealed to the Supreme Court, which reversed the judgment of the Superior Court, and remanded the cause to the criminal court, with directions that the sentence imposed by that court be carried into execution. At the time of the Commission of the offense, and at the time of the trial in the criminal court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court

of the State from the judgment of the Superior Court granting the defendants a new trial. It appeared that the right of appeal from the Superior Court to the Supreme Court was conferred upon the State after the commission of the offense and the trial in the criminal court, and before the Superior Court had granted a new trial. A motion was made in this court to dismiss the writ of error to the Supreme Court of North Carolina from its judgment reversing the judgment of the Superior Court and directing that a sentence be imposed on the plaintiff in error by the criminal court. The plaintiffs in error had no opportunity to raise, in the criminal court, the question of the validity of the act allowing an appeal to the Supreme Court from the decision of the Superior Court, because the legislation was not enacted until after the trial had been completed. They did, however, have an opportunity to raise that question in the Superior Court. The question was not raised there. Nor was the question raised in the first opinion filed by the State Supreme Court. This court, however, held that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State and were by that court considered and decided against the party invoking their protection, inasmuch as the record disclosed that after the first opinion of the Supreme Court had been filed, but before it had been certified down, the defendants filed a petition for re-argument, and presented the Federal questions, and the Supreme Court entertained the petition and proceeded to discuss and decide

such questions. In discussing this point the court said:

> "But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.
>
> "It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for re-argument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision. Loeber v. Schroeder, 149 U. S. 580; Sayward v. Denny, 158 U. S. 180; Pim v. St. Louis, 165 U. S. 273.
>
> "But those were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State* v. *Mallett*, 125 N. C. 718. Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action."

This opinion seems to be conclusive as to the correctness of our contention in the case at bar. The Court of Appeals of Kentucky, in this case, recognized the Federal questions relied on as a defense to the action; and that court considered and proceeded to discuss and to decide such questions, which questions, being invoked by the plaintiff in error, were decided against it. Consistently with the opinion in the Mallett case, there seems to us to be no other conclusion to be arrived at than that the Federal questions were fully presented in the case at bar.

In National Mutual Building & Loan Association v. Brahan, 193 U. S. 635, it was held that where the plaintiff in error, defendant below, after filing a general issue, moved to amend, claiming rights under the Fourteenth Amendment, and on the trial asked an instruction based on his rights thereunder, he was entitled to the instruction if the rights asserted actually existed, and it was also held that the Federal question was raised in time, and the writ of error from this court would not be dismissed. In that case, to the declaration of the defendant in error the plaintiff in error filed the general issue. Thereafter the plaintiff in error made motions for leave to amend its notice under the general issue. The amendments claimed rights under the Fourteenth Amendment to the Constitution of the United States. The defendant in error moved to strike out the amendments on the ground that they were filed without leave of the court. The motion was granted. It was contended by the defendant in error that the Federal questions presented

could not be considered, because they were not raised in time and in the proper way, and because the Supreme Court of the State did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the State practice. This court, in passing on the question, said:

> "Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time."

In Land & Water Company v. Sam Jose Ranch Co., 189 U. S. 177, it was held that, while a Federal right claimed was not originally specially set up by the plaintiff, the right appeared to have been insisted upon in the argument, and that, under the rule of this court requiring the opinions to be sent up with the record, it was a sufficient compliance with the words "specially set up and claimed," that the question was fully considered in the opinion of the court and ruled against the plaintiff in error.

In Fullerton v. Texas, 196 U. S. 193, it was held that while it is too late to raise a Federal question by petition for rehearing in the Supreme Court of a State after that court has pronounced its final decision, still, if the Supreme Court entertains the petition and disposes of

the Federal question, it will be sufficiently raised—citing Mallett v. North Carolina, *supra*.

To the same effect is Corkran Oil Co. v. Arnaudet, 199 U. S. 182.

In Montana *ex rel.* Haire v. Rice, State Treasurer, 204 U. S. 291, it was held that although a Federal right may not have been specially set up in the original petition or earlier proceedings, if it clearly and unmistakably appears from the opinion of the State court under review that a Federal question was assumed by the highest court of the State to be in issue, and was actually decided against the Federal claim, and such decision was essential to the judgment rendered, this court has jurisdiction to re-examine that question on writ of error. In that case no reference was made to any Federal right in the petition for the writ of mandamus, the demurrer, or the motion to quash, and the Federal question was first brought forward by the plaintiff in error in the petition for hehearing.

The foregoing authorities demonstrate that no particular form or method of presenting the Federal question need be followed, that it is sufficient if it appears from the whole record that some provision of the Federal Constitution or some act of Congress was relied on by the party who brings the writ of error and the right thus claimed was denied. It is contended by the defendant in error that the rights claimed by the plaintiff in error were "put at rest by that judgment," that is, the first opinion of the Court of Appeals. If that is true, then the necessary force and effect of said opinion was

to deny to the plaintiff in error the rights claimed by it under the Constitution and laws of the United States, and the Federal questions are obviously in the case. But, independently of that point, it must be admitted that the Court of Appeals of Kentucky decided the case, on the second appeal, on the Federal questions alone,—holding that said questions were squarely in the record, but that the claims made thereunder could not be allowed, because the averments of the amended answers, which were assumed to be true, did not state a defense to the claim of the defendant in error.

It is no answer to the first amendment to say that the rate of $4.00 a car was fixed, not by the Railroad Commission, but by the plaintiff in error itself, and that, therefore, it could not complain of the fact that the rate was confiscatory; for the amendment avers that the plaintiff in error did not, at Henderson or at any other point, preform the service demanded by the defendant in error and that the tariff provision referred to did not apply to the service demanded by the defendant in error. And said averments must be taken as true, in testing the defense set up in said amendment. Besides, the record shows that neither by the application of said tariff provision to any service performed at Henderson, Kentucky, nor by any reasonable construction of said provision, can it be said that it was the duty of plaintiff in error, under said provision, to perform the service demanded by the defendant in error.

The plaintiff in error should not be cut off from having the judgment of the State court in this case re-

viewed by this court, merely because the Court of Appeals of Kentucky has arbitrarily and erroneously said that the rate was fixed by the plaintiff in error and therefore it must perform the service. If the requirement of the judgment in the State court compels the plaintiff in error to perform the service for less than the cost thereof—which is confessedly true,—it is immaterial whether the requirement is in the form of a statute of the State or a regulation made by the Railroad Commission of the State, or whether it is in the form of a judgment of the State court based upon an erroneous and arbitrary construction of a tariff provision. In the case at bar it is in the last-mentioned form, but it as effectually deprives the plaintiff in error of its rights under the Federal Constitution as if it were in the form of a legislative act or a regulation made by the Railroad Commission. It therefore comes within the inhibition of the Fourteenth Amendment. (C., B. & Q. R. Co. v. Chicago, 166 U. S. 226.)

Coming to the claim of the plaintiff in error asserted under the commerce clause of the Constitution of the United States, the Kentucky Court of Appeals holds that no regulation, by the State, of the intrastate business of an interstate carrier is invalid. In so holding, the court, in effect, said that although the State in regulating the intrastate traffic of an interstate carrier encroaches upon the free exercise of the power vested in Congress by the Constitution, the State regulation is nevertheless valid. Upon no other ground could the court have held that the averments of the second

amended answer stated no valid claim under the Federal Constitution. This ruling of the court unquestionably presents a Federal question, which was decided adversely to the claim of the plaintiff in error, as well as erroneously. (St. Louis Southern R'y Co. v. State of Arkansas, 217 U. S. 136; McNeil v. Southern R'y Co., 202 U. S. 543; Western Union Tel. Co. v. Pendleton, 122 U. S. 347; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.)

These questions are of vital importance to the interstate carriers engaged in intrastate commerce in the State of Kentucky. They involve the right of such carriers to make reasonable rules and regulations for the operation of their lines of road, the distribution of their equipment, the establishment of depots and team tracks at reasonable places for the receipt and delivery of freight, and the carrying on of their business under the laws of the State and of the nation. If the opinion in this case stands, then the State of Kentucky can, under an erroneous and arbitrary construction of a traiff provision, require the carriers operating in this State to perform any sort of intra-urban or intrastate service at a rate less than the cost of said service; it can add—and, in fact, it has by this decision added—to the duties of such carriers by making it obligatory on them to furnish equipment for, and to haul freight between, private spurs in every terminal in the State. If transportation must be performed between private sidings in the same terminals, it must *a fortiori* be performed between different team tracks or different platforms at

the same station. The opinion forces the carriers to devote their terminals, designed to be used for storing cars and in separating and making up trains, to transportation service. It destroys the efficiency of railroad service. It will result in the establishment of a system of railroading to compete with drays and teams in cities and terminals. A requirement that such carriers haul passengers between different points in the same terminals will likely follow. Such a requirement is no more unreasonable than the requirement that they engage in transporting freight between private spurs at the same station.

We feel confident that, on reading the record in this case, the court will conclude that the decision of the State court in this case violates both provisions of the Constitution relied on by the plaintiff in error, and we respectfully ask that the motion of the defendant in error to dismiss and affirm be denied, and that the case be passed until it is regularly reached on the docket of this court for oral argument and for hearing on the entire record.

Respectfully submitted,

BENJAMIN D. WARFIELD.
MALCOLM YEAMAN,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

No. 322.

MAR 23 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

[redacted]

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

JOE HIGDON, Doing Business Under the Name of Crescent Coal Company, Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

YEAMAN & YEAMAN,
EDWARD S. JOUETT,
WM. A. COLSTON,
HENRY L. STONE,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Index to Subjects and Authorities.

PAGE

1. Statement of issues and facts on which judgment is based ..... 2 to 10

Sections 214-215, Constitution of Kentucky, 9
Sec. 1 of Fourteenth Amendment to Constitution of U. S. 5
Sub-sec. 3, Sec. 8, Article I, Constitution of U. S. 5

2. Errors relied on for a reversal ..... 10 to 13

3. The judgment of the Court of Appeals of Kentucky in this case deprives the plaintiff in error of the reasonable control of its property and facilities used in the conduct of its business and therefore violates the Fourteenth Amendment to the Constitution of the United States .... 14 to 45

Am. and Eng. Ency. of Law 158 17
C. & O. R'y Co. v. Hall, 136 Ky. 379 21
Constitution of Kentucky, Sections 214-215.. 37
Clark Co. v. Lake Shore, etc., R. R. Co., 11 I. C. R. 558 40
Dixon v. Central of Georgia, 35 S. E. 369... 16
Elkins v. Boston, etc., R. R. Co., 28 N. H. 275, 19
Elliott on Railroads, Sec. 1466 18
Grand Trunk Railway Co. v. Michigan Railroad Commission, 231 U. S. 457 27
Hoover, *et al.*, v. Pennsylvania R. Co., 156 Pa. 229 41

PAGE

Harp v. Choctaw, 118 Fed. 169 21
Hutchinson on Carriers, Sections 59, 60, 144, 19
Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S. 263 38
Interstate Commerce Commission v. Alabama Midland R'y Co., 69 Fed. 227 38
Johnson v. Midland R. R. Co., 4 Exch. 367 .. 21
Kansas Pac. R. Co. v. Nichols, 19 Kan. 247.. 21
Ky. R. R. Commission v. L. & N. R. R. Co., 10 I. C. R. 173 41
Lake Shore, etc., R'y Co. v. Smith, 173 U. S. 684 31
Lake Shore & Michigan Southern R'y v. Ohio, 173 U. S. 285 32
Laurel Cotton Mills v. Gulf & S. I. R. Co., 37 Southern Rep. 134 43
Lee, etc., v. Burgess & Graham, 9 Bush, 652, 21
L. & N. R. R. Co. v. Com. of Ky., 108 Ky. 628, 42
L. & N. R. R. Co. v. Com. of Ky., 105 Ky. 179, 42
L. & N. R. R. Co. v. Central Stock Yards Co., 212 U. S. 132 22
Miner v. New York, etc., R. R. Co., 11 I. C. R. 422 40
Moore on Carriers, p. 98 17
Oxlade v. N. E. R. Co., 1 C. B. N. 454 18
Pitlock v. Wells Fargo & Co., 109 Mass. 452, 21
Pfister v. Central Pac. R. Co., 59 Am. Rep. 404 18
Sante Fe, Prescott & Phoenix R'y Co. v. Grant Bros. Construction Co., 108 Pac. 467 35
State, *ex rel.*, Ellis v. Atlantic Coast Line Railroad, 12 L. R. A. (N. S.) 506 35
Texas & Pacific R'y Co. v. Interstate Commerce Commission, 162 U. S. 197 39

PAGE

Varble, etc., v. Bigley, 14 Bush, 698 20
Wilson Produce Co. v. Pennsylvania R. Co., 14 I. C. R. 170 40
Wisconsin R. R. Co. v. Jacobson, 179 U. S. 287 29

4. The judgment of the Court of Appeals of Kentucky in this case is contrary to the Fourteenth Amendment because it requires plaintiff in error to perform a service at a rate that does not afford reasonable compensation for such service ..... 44 to 56

Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission, 206 U. S. 1 56
Attorney General v. Old Colony Railroad Co., 22 L. R. A. 112 53
Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota, 134 U. S. 418 53
Dow v. Beidelman, 125 U. S. 680 55
Georgia Railroad & Banking Co. v. Smith, 128 U. S. 179 55
Lake Shore & M. S. R'y Co. v. Smith, 173 U. S. 684 51
Minneapolis & St. Louis Railroad Co. v. Minnesota, 186 U. S. 257 55
Missouri Pacific R'y Co. v. Nebraska, 164 U. S. 403 50
Railroad Commission Cases, 116 U. S. 307 .. 55
Smyth v. Ames, 169 U. S. 466 54

PAGE

5. The decision of the Court of Appeals of Kentucky in this case and Sections 214 and 215 of the Constitution of said State as construed by the court in said decision impose an unreasonable burden upon the Interstate Commerce of plaintiff in error, and are therefore repugnant to the commerce clause of the Constitution of the United States ..... 56 to 69

Atlantic Coast Line Railroad Co. v. Wharton, etc., 207 U. S. 328 64
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 60
Herndon v. Chicago, R. I. & Pacific R'y, 218 U. S. 135 64
L. & N. R. R. Co. v. Eubank, 184 U. S. 27 ... 62
McNeill v. Southern Railway Co., 202 U. S. 543 60
Mississippi Railroad Commission v. Illinois Central Railroad Co., 203 U. S. 305 66
St. Louis Southwestern R'y Co. v. State of Arkansas, 217 U. S. 136 61
Western Union Telegraph Co. v. Pendleton, 122 U. S. 347 61

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 748.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - *Plaintiff in Error,*

versus

JOE HIGDON, DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY, - - - - - - - - - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

BRIEF FOR PLAINTIFF IN ERROR.

This case is before this court on writ of error to the Court of Appeals of Kentucky, the highest court of that State, in which there was an affirmance of a judgment of the Henderson Circuit Court of Kentucky, in favor of defendant in error and against plaintiff in error, for $3,037.10, with interest.

The case was twice before the Court of Appeals of Kentucky, and the record before this court embraces the record on each of the appeals to that court. There are, therefore, in the record duplications of certain pleadings,

exhibits and depositions, which, for the convenience of the court are designated, in the note below, by reference to the pages of the record on which the duplications appear.* (The italics is this brief are ours.)

I.

STATEMENT OF ISSUES AND FACTS ON WHICH THE JUDGMENT IS BASED.

This is a suit against the plaintiff in error to recover damages on account of its refusal to transport coal from the private spur of the Keystone Mining & Manufacturing Company to other private spurs at Henderson, Ky.

The town of Henderson has a population of about fifteen thousand inhabitants. Defendant in error, doing business under the name of Crescent Coal Company, was, at all the times referred to in this record, a coal merchant in said town. The mine of the Keystone Mining & Manufacturing Company is located in the town of Henderson and within the switching limits of said station. Said mine has a private spur connection with the plantiff in error's tracks. There are two other mines in Henderson,

*1. Motions and pleadings on first appeal to Court of Appeals, between pages 2 and 12, both inclusive, were copied in the transcript on second appeal to said court and appear the second time between pages 183 and 193, both inclusive.

2. Exhibits 1 to 9, both inclusive, appearing first in record on pages 41 to 46, both inclusive, are duplicated on pages 206 and 207, and from page 218 to page 222, both inclusive.

3. Deposition of L. A. Bosserman appears first on pages 50 to 58, both inclusive, and again on pages 247 to 252, both inclusive.

4. Deposition of C. B. Compton taken April 20, 1910, appears first on pages 108 to 127, both inclusive, and again on pages 258 to 277, both inclusive.

5. Deposition of Henry Liveright appears first on pages 140 to 142, both inclusive, and again on pages 277, 278.

selling coal for local consumption, neither of which has spur connection with any railroad company, and both of which make deliveries of coal by wagon at a cost of about 30 cents a ton. Deliveries of coal from the Keystone mine to other points in Henderson could also be made by wagon at a like cost.

Henderson is situated in a coal-producing district. The coal mines in that district having rail connection with Henderson—some of which are only ten miles distant therefrom, and others at increasing distances, to fifty miles—were each given the same rate per ton on shipments of coal to Henderson, the rate of 50 cents.

The spur of the Keystone Mining and Manufacturing Company was constructed, at the instance of the owners of said company, about the time said mine was opened. At that time, and always thereafter, it was understood by the owners and operators of said mine that the plaintiff in error would not furnish cars on said spur, to be loaded with coal, and transport the coal therefrom to similar private spurs at Henderson, where it would be consumed. The spur was merely a private loading and unloading track for said mine, to be so used by it in delivering to the railroad company freight for shipment to points outside of Henderson, and for receiving freight consigned to it from points outside of Henderson.

On May 14, 1908, defendant in error contracted with the Keystone Mining & Manufacturing Company for not less than 10,000 nor more than 20,000 tons of coal, to be furnished during the year beginning July 1, 1908, f. o. b. cars on the private spur of said mine, at certain stipu-

lated prices; and on May 27th, by agreement with said Mining Company, he became the sole agent of said mine for the selling of coal in carload lots within the limits of the city of Henderson for the year beginning July 1, 1908.

Thereafter, on July 1st, the defendant in error requested the plaintiff in error to place a car on the side track of said mine, for loading coal, and, after it should be loaded, to transport the car to another similar side track at the Henderson station, at a rate of $4 for the service, which was the switching rate at Henderson. The plaintiff in error refused to perform the service, and based its refusal on the ground that the service was not a switching service, but a transportation service which it did not perform between two points at the same station. After many similar demands and refusals, the defendant in error brought this action for damages. The case was transferred to equity, and heard by the chancellor at the October (1910) term of the Henderson Circuit Court, and a judgment entered dismissing the petition of defendant in error. On appeal to the Court of Appeals of Kentucky, the judgment was reversed and remanded. The opinion will be found on pages 151 to 159 of the Record. On the filing of the mandate of the Court of Appeals, reversing the judgment of the Henderson Circuit Court, the case was transferred to the ordinary docket of the latter court. On the same day that the mandate of said court was filed, the plaintiff in error tendered and moved to file an amended answer and to make the same the second paragraph of its original answer; and six days thereafter it tendered and moved the

court to file a second amended answer. The motions were overruled, to which rulings of the court the plaintiff in error excepted, and, on its motion, the amended answers were identified and made parts of the record in the case.

By the first of said amended answers, the plaintiff in error pleaded that the rate of $4 a car for the service demanded by defendant in error was less than the actual cost of same, and that to require the plaintiff in error to perform the service at all, and particularly at that rate, would deprive it of its property without due process of law, contrary to the Fourteenth Amendment.

By the second amended answer tendered, the plaintiff in error alleged, in substance, that to require it to perform the service demanded by defendant in error would impose upon it duties so irksome as to render it unable to perform its legitimate duties as a carrier of intrastate commerce and its duties as a carrier of interstate commerce, and that such a requirement would therefore violate the commerce clause of the Constitution of the United States. The allegations of both amendments stand uncontroverted, and the Court of Appeals, in its second opinion in this case, treats the amendments as having been properly tendered, but as not stating a defense to the claim asserted by the defendant in error.

The case was retried in the Henderson Circuit Court, and a judgment was rendered in favor of the defendant in error for $3,037.10, with interest thereon, at the rate of six per cent. per annum from date until paid. The Court of Appeals of Kentucky affirmed said judgment, in the opinion just referred to, on June 21, 1912. (R., 284 to

288, both inclusive.) It is to review the judgment of affirmance of the Court of Appeals of Kentucky that the writ of error from this court was issued July 10, 1912.

At the October (1912) term of this court the defendant in error moved the court to dismiss the writ of error in this case and to affirm the judgment of the Court of Appeals of Kentucky. The motion was objected to by plaintiff in error, and both parties filed briefs on said motion. Said motion was passed by the court until the hearing of the case on its merits.

The service which the defendant in error demanded that the plaintiff in error perform, and which the latter refused to perform, was an intra-urban, or intrastation, transportation service. The plaintiff in error had never handled coal between private sidings at Henderson, or between private sidings at any other station on its road. It had never engaged in the business of intra-urban transportation. It did on two occasions, to-wit: March 4, and April 15, 1908, respectively, move a car from the siding of the Keystone mine to another private siding at that station, but the circumstances under which the movement was made were unusual, as shown by the testimony of R. W. Powell. (R., 78 and 79.) In each instance referred to, the car was placed under the belief on the part of Agent Powell that it was to be loaded and shipped to a point outside of Henderson. And when he was informed that the order had been canceled, the car was transferred to another private siding for unloading, in order to relieve the car, and as an accommodation to the mine. Except in the two instances mentioned, the plain-

tiff in error had never handled coal between private sidings at the Henderson station or at any other station on its road. It did switch to the private spur of the Keystone mine, and was always willing to do so, cars coming into Henderson, and did place on said spur cars for loading and shipment to points outside of Henderson. That, however, was not the character of service that defendant in error sought.

The plaintiff in error did handle grain and milling products between private sidings at Henderson, but the conditions under which the same were handled were wholly different from the movement of coal from the Keystone spur to other sprivate spurs, in that Henderson—like other Ohio River rail crossings, such as Paducah, Louisville, and Cincinnati—was engaged in the business of handling grain and grain products for the vast territory south of the Ohio and Potomac rivers and east of the Mississippi River; and in order to enable the industries at Henderson engaged in that business to treat properly the grain coming into Henderson and convert it into milling products, for shipment to the South, the plaintiff in error handled the grain there much after the nature of a milling-in-transit arrangement. Very little of the grain handled at Henderson was consumed at that point. It originated along the Ohio River and was brought to Henderson by boat or rail and transferred to the elevators and mills, where it could be properly treated in order to meet the commercial necessities for grading, etc., and to be converted into mill products. The transfer from the wharf boat by cars to said industries was a necessary

auxiliary to the conduct of the business. The grain moved by cars from the wharf boat to industries was further transported from Henderson, Ky., to the destination at which it was sold or consumed. This was in the nature of a reshipping arrangement, and in order to get the haul into Henderson, or the haul out of Henderson, the plaintiff in error engaged in transporting grain from the wharf boat to mills and elevators, and between mills and elevators. It did not at any time transport any product of any kind originating at one industry in Henderson to another industry at Henderson, there to be consumed, except when it transported the two cars of coal from the Keystone mine under a misapprehension of the reason for requesting the transportation.

There appear in this record some sporadic instances of the handling of freight between private sidings at a few stations other than Henderson. They are, however, immaterial as affecting the issues in this case, as it was not the custom of plaintiff in error to engage in intrastation transportation at any of said stations, and in the instances referred to the conditions were wholly dissimilar from those under which defendant in error requested the transportation of coal from the Keystone spur to other private spurs at Henderson. (Compton's testimony, R., 108-127.)

The questions for decision in this case are: (1) Is it or not the duty of the plaintiff in error to engage in the business of intrastation transportation; and (2) if it is, can the plaintiff in error be compelled to perform such

service at Henderson, Ky., at a rate below the actual cost of the service?

The Court of Appeals of Kentucky decided—

(1) That it was the duty of the plaintiff in error, at common law, to furnish the service demanded; that is, that it was its duty to engage in the business of intra-urban transportation at the stations on its line of road.

(2) That the plaintiff in error was in duty bound to perform the service demanded by defendant in error, at the rate fixed by plaintiff in error for a switching service, under Section 9 of its Terminal Tariff, which is as follows:

> "The L. & N. R. R. Co. does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson, Ky., terminals, but where any such service is performed as an accommodation a charge of $2 per car, plus $2 per car for car rental, shall be assessed."

(3) That the tariff provision in question, independently of the construction given it by the plaintiff in error in its handling of grain at Henderson, did not apply to the service sought by defendant in error; but, as plaintiff in error had treated such provision as applicable to the handling of grain at that point, it was legally compellable to apply the provision to the service in question.

(4) That, aside from the plaintiff in error's primary duty to furnish the intra-urban service sought, the refusal to furnish it was an unjust discrimination against defendant in error, under Sections 214 and 215 of the Constitution of the State of Kentucky, inasmuch as the plain-

tiff in error had handled grain from the river incline to mills and elevators and from elevators to mills at that station, for a switching charge; and that by the latter service it obligated itself to perform the service demanded by defendant in error.

(5) That neither of the amended answers tendered by plaintiff in error stated a defense to the claim of defendant in error.

We submit that this case is properly reviewable by this court, not only on the ground that the Court of Appeals of Kentucky took cognizance of, and decided adversely to the plaintiff in error, the Federal questions relied on by it, in its amended answers, as a defense to the claim asserted by defendant in error, but also on the ground that the necessary force and effect of the judgment of said court is to deprive the plaintiff in error of its property, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

II.

ERRORS RELIED ON FOR A REVERSAL.

The plaintiff in error seeks a reversal of the judgment of the Court of Appeals of Kentucky on the following grounds:

1. The plaintiff in error had established a station at Henderson with ample facilities for the accommodation of shippers at that point. It did not engage in the business of transporting coal between private loading and unloading tracks at that station. The judgment in this

case requires the plaintiff in error to furnish cars for the loading of coal on the Keystone Spur and transfer the coal from said spur to industries having similar spurs at the same station, to be consumed by such industries. It, in effect, converts all such spurs at said station and like stations on plaintiff in error's road in Kentucky into separate depots between which plaintiff in error must engage in transportation. In that respect the judgment deprives the plaintiff in error of the reasonable control of its property and facilities and denies to it the right to make reasonable rules and regulations in establishing depots and stations and in operating its road and equipment, and therefore, we contend, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The said court erred in holding that, under Sections 214 and 215 of the Constitution of the State of Kentucky, the refusal of the plaintiff in error to perform the service demanded by the defendant in error was a discrimination against defendant in error, for which the plaintiff in error was liable in damages. Said service was an intra-urban service. It was a character of service which the plaintiff in error performed for no one, and which it never professed, or held itself out as willing, to perform for any one. It did perform at Henderson, Ky., and other points on its line of road, a switching service, which is an auxiliary to a transportation service, but the service demanded by the defendant in error was purely a transportation service between sidings at the same station. The plaintiff in error contends that said constitutional pro-

visions, when construed as the opinion of the Court of Appeals construes them—as requiring plaintiff in error to perform said service, because to do otherwise would be an unjust discrimination against the defendant in error and would give undue preference to those for whom it performed a switching service as an auxiliary to a transportation service,—violate Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deprive the plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws.

3. Said court erred in holding that it was the duty of plaintiff in error to perform the service demanded by defendant in error, at a rate less than the actual cost of said service. It was not the duty of plaintiff in error to perform the service for any rate of compensation, or at all; and the judgment of the Court of Appeals of Kentucky, requiring the plaintiff in error to perform said service at a rate below a reasonable and just charge for the service, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws. The judgment of said court as to this phase of the case was based on the erroneous premise that the service demanded was similar to, or identical with, the switching of grain at Henderson, which switching, with rare exceptions, preceded or followed a transportation haul.

4. The service demanded by defendant in error was wholly within the State, but the policy of the State of

Kentucky as announced in the opinion of the Court of Appeals in this case, and made effective throughout the State by such opinion, requires the plaintiff in error and all other carriers of interstate commerce to engage in the business of intra-urban carriage, in competition with drays and transfer companies, and also requires them to promulgate rates for, and regularly engage in, the transportation of freight between industrial tracks at every town and station in the State, and thus seriously hampers and interferes with the interstate commerce business of such carriers. The opinion of the Court of Appeals in this case holds that, inasmuch as the service in question was wholly within the State, the State has the right and power to require the plaintiff in error to perform the service or to respond in damages for refusing to perform it, even though the performance of it by the plaintiff in error and the carrying out of the policy of the State as announced in said opinion would seriously interfere with plaintiff in error's interstate commerce business and would impose a direct burden upon such commerce. The judgment of said court in that respect violates Sub-section 3, Section 8, Article 1, of the Constitution of the United States.

III.

BRIEF OF ARGUMENT.

1.

THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY DEPRIVES THE PLAINTIFF IN ERROR OF THE REASONABLE CONTROL OF ITS PROPERTY AND FACILITIES USED IN THE CONDUCT OF ITS BUSINESS, AND, THEREFORE, VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is our contention that the decision of the State court is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States because it imposes upon plaintiff in error obligations inconsistent with its duties as a common carrier and against the policy of the government in its dealings with common carriers, and thus deprives the plaintiff in error of the reasonable control of its property and facilities used in conducting its business, and, therefore, is contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

This contention involves two inquiries, namely:

(a) Whether, independently of what was the practice of plaintiff in error in Henderson, prior to and during the period involved in this controversy, with respect to transferring freight between private sidings at that station, it was within the power of the State to require the service in question; and,

(b) Did the plaintiff in error, by its method of doing business at Henderson and its practices in the course of its business there, invest the State of Kentucky with the power the State otherwise would not have had to require the service in question?

The opinion of the court applies the affirmative of both propositions to this case. We shall ask a consideration of each of them without relation to the other.

(a) With respect to the duty of the plaintiff in error to perform the service demanded by the defendant in error, it might be observed that it is the duty of a common carrier to engage generally in the business of carrying freight, subject to reasonable regulations that the carrier may promulgate and observe. It may restrict itself to accepting and carrying property of such kinds as it publicly professes and undertakes or is accustomed to carry, and also to carrying to and from such places as it publicly professes and undertakes to carry. Likewise it may establish regular depots or places at which it will receive and deliver freight; and, if its rules with reference thereto are reasonable, it can not be required to receive or deliver freight at other places in the immediate vicinity of such regular depots.

The plaintiff in error had established at Henderson, Ky., a station for the receipt and delivery of freight consigned to and shipped from that station, which station served a small territory in which the Keystone Mining & Manufacturing Company's plant was located. The area served by said station was not so large that it was not easily accessible to all shippers in that locality.

Nevertheless, for the convenience of certain shippers at said station receiving and shipping a sufficient quantity of freight in carload lots to justify the cost of private spurs, it constructed spurs to their industries, to be used for loading and unloading freight.

The defendant in error, perceiving that the cost of transporting coal from the Keystone mine to such industries by rail, at the rate charged for switching, would be cheaper than the cost of transporting it in the usual way, by wagon, requested the plaintiff in error to perform the service of rail transportation. The service requested was essentially a transportation service, free of any of the features characterizing a switching service. Dixon v. Central of Georgia, 35 S. E. 369.

The movement that the defendant in error desired to effect was from one point at said station to another point at the same station. It was a movement under the jurisdiction of one station agent. In fact, it was a movement that the plaintiff in error could not treat, in its regular course of business, as creating any mileage at all.

Assuming it to be true, as we contend, that the plaintiff in error had not, at Henderson or at any other station on its line of road, engaged in the character of service demanded by the defendant in error, the question is: Was its rule with respect thereto a reasonable rule, and, if it was, was it within the power of the State of Kentucky, under the Fourteenth Amendment, arbitrarily to deprive it of the right to make and enforce such a rule?

Under the law, there is, we submit, no doubt of the reasonableness of the rule or of the right of the plaintiff in error to promulgate and enforce it.

In Vol. 5, Am. and Eng. Ency. of Law, 158, the author says:

> "It is the duty of every common carrier to receive for carriage and to carry the goods of any person tendered to it for transportation, provided they are such as it holds itself out as willing to carry and the party tendering them offers to pay its proper charges."

The same author again, on page 162, says:

> "The duty to accept for carriage and to carry goods tendered is not an absolute duty on the part of a carrier, but is subject to reasonable limitations and conditions. A carrier is not a common carrier as to every character of goods, but only as to such as he professes to carry; he may therefore refuse to accept for transportation goods of a character which it is not his business or custom to carry, and which he does not hold himself out as willing or undertaking to carry.
>
> "And he may profess to carry a certain character of goods only in a certain way, and may refuse to carry them under any other conditions."

In Moore on Carriers, page 98, it is said:

> "A common carrier of goods is not under obligation to accept and carry all personal property that may be offered to it. Its duty is limited to accepting and carrying property of such kinds, to and from such places, as it publicly professes and undertakes, or is accustomed, to carry, and has the facilities for so doing. If it has never assumed or offered to carry chattels of a certain class, except

upon special terms exempting it from all the important duties and liabilities of a common carrier, it can not be made amenable in the character of a common carrier as to such property. The carrier may determine by public announcement or profession the kind of goods it will carry, the conveyances to be used, and the maner and time for transportation, the conditions fixed being such as are just and reasonable, and treating all alike."

Many authorities are cited in support of the texts quoted, one of which is Pfister v. Central Pac. R. Co. (Cal.), 59 Am. Rep., 404, in which the duty of a common carrier was defined to be that of accepting and carrying property of a kind that it undertook or was accustomed to carry. Other cases are cited in which it is held that a carrier may profess to carry a particular description of goods only, in which case it could not be compelled to carry any other kind, or that it may limit its obligation to carrying from one place to another, and then it would not be bound to carry to and from intermediate points. Among the cases cited is Oxlade v. N. E. R. Co., 1 C. B. N. S. 454, in which it was held that if a railroad company does not hold itself out as a common carrier of coal, it is not obliged to carry coal from station to station or for coal merchants, and may restrict its coal traffic to the carriage of coal for collier owners, from the pit's mouth to stations where such collier owners have their depots.

In Elliott on Railroads, Section 1466, it is said:

"The general rule that a railroad company is under a duty to carry goods properly offered for transportation is, as we have indicated, subject

among other limitations and qualifications to the limitation that its obligation extends only to the kind of goods the company undertakes to carry. In other words, railroad companies are common carriers only as to those goods which are of the kind usually or professedly carried. Thus, a railroad company which does not undertake to carry dogs can not be held liable as a common carrier to one whose dog was carried in violation of the rule and by virtue of a special agreement with the baggage-master. A farther qualification of the general rule is that railroad companies are common carriers to the extent only of those means and methods of transportation which they own, use, or hold out to the public."

Among the cases cited in support of this text is Elkins v. Boston, etc., R. Co., 23 N. H. 275, where it was held that a railroad company which occasionally carries goods in passenger trains is not a common carrier of goods in such trains. And, similarly, railroads which occasionally carry passengers in freight trains do not thereby become, as to those trains, carriers of passengers.

In Hutchinson on Carriers, Section 144, it is said:

"It has been already observed that no common carrier is a carrier of all kinds or classes of goods. This would be impossible. Therefore before he can be made liable to damages for a refusal to carry such as are offered to him for that purpose, it must be made to appear that they were of the kind which he usually carried, or which, by his public profession, he was bound to accept for that purpose. The law will only impose the obligation upon him in this respect co-extensive with the public expectations which he has created by his course of business or the invitations he has publicly held out to those who may solicit his services."

The same author, Section 59, says:

> "In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is, therefore, not liable as such where, by special engagement or as a matter of accommodation merely, he undertakes to carry a class of goods which it is not his business to carry."

In Section 60 of the same authority it is said:

> "Common carriers of goods do not undertake to carry by any or all means, but only by those means and methods and over the route to which their business is confined."

The Court of Appeals of Kentucky, in Varble, etc., v. Bigley, 14 Bush, 698, after discussing the duties and obligations of a common carrier, and reviewing many authorities, said:

> "Our conclusion then is that a carrier of goods is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action if, without reasonable excuse, he had refused to receive them; and that he could not be liable to such an action, unless he had expressly and publicly offered to carry for all persons indifferently, or had, by his conduct and the manner of conducting his business, held himself out as ready to carry for all.
>
> "We are aware that the rule has not always, and perhaps not generally, been thus restricted. But as we have already said, the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly as-

> sumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it."

In Harp v. Choctaw, 118 Fed. 169, it was held that the action of a railroad company in furnishing cars to be loaded by wagon on its tracks at a station with coal for shipment in one direction to points within the State, while it refused to furnish cars to be loaded for interstate shipments in the opposite direction, was not an unlawful discrimination against a shipper, where the order applied to all persons alike. The opinion, in discussing the duty imposed by law on the carrier with respect to carrying freight, says:

> "All are to be treated alike. The answer to these questions, therefore, is that if the defendant company is engaged in carrying coal, or permitting it to be loaded in its yards, in the manner stated, for one person, it can not lawfully deny it to another; but if it does not hold itself out as doing that kind of transportation, and is not in the habit of doing it for anybody, then no one has any right to complain."

See, also, in this connection Kansas Pacific R. Co. v. Nichols, 19 Kans. 243; Johnson v. Midland R. R. Co., 4 Exch. 367; Pitlock v. Wells, Fargo & Co., 109 Mass. 452; Chesapeake & Ohio R'y Co. v. Hall, 136 Ky. 379, 124 S. W. 372; Lee, etc., v. Burgess & Graham, 9 Bush, 652.

So far as we have been able to find, no court of last resort has ever held that a railroad company is bound to carry all kinds of freight, under all circumstances, and between all points on its line, including points within the

same switching limits. Its right to restrict and limit its duty of carriage is, of course, subject to the rule that the restrictions and limitations are to be kept within the bounds of good faith and fair and reasonable conduct on the part of the carrier. So long as the limitations are kept within the bounds of good faith and reasonable conduct, and so long as the carrier treats all persons similarly situated alike, it has the right to decline to receive and transport freight if its declination is based on reasonable grounds and does not work an unjust discrimination against any shipper.

There seems to us to be no doubt, under the authorities referred to, that the plaintiff in error had the right to make reasonable rules and regulations governing the handling of freight at Henderson, by which it and the public were alike bound; also that its policy with respect thereto, as shown by all the evidence in this case, was a reasonable policy, of which the State, acting within constitutional limits, could not deprive it. The latter proposition is well established.

In Louisville & Nashville R. R. Co. v. Central Stock Yards Co., 212 U. S. 132, this court had under consideration Section 213 and other provisions of the Constitution of Kentucky, under which it was held by the Court of Appeals of Kentucky that it was the duty of the Louisville & Nashville Railroad Company to transport live stock, that it had transported to the city of Louisville, from its live stock depot to the live stock depot of another carrier in the city, and also to accept live stock at points where it had physical connection with the

Southern Railway in the city of Louisville and transport the same from those points to its live stock depot (the Bourbon Stock Yards) in said city. The judgment of the Court of Appeals of Kentucky required the Louisville & Nashville Railroad Company (1) to receive at its stations in Kentucky, and to bill, transport, transfer, switch and deliver in the customary way, at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there; (2) to transfer, switch and deliver to the Southern Railway at the said point of connection, any and all live stock or other freight coming over its lines in Kentucky consigned to the Central Stock Yards or persons doing business there; (3) to receive at that point of physical connection with the tracks of the Southern Railway and to transfer, switch, transport and deliver all live stock consigned to any one at the Bourbon Stock Yards, the shipment of which originated at the Central Stock Yards, with the proviso requiring pay or tender of proper charges for its services, whenever demanded, at the time such live stock or other freight was offered.

The points relied on in this court by the railroad company for a reversal of the judgment of the Court of Appeals of Kentucky in that case were (1) that if the Constitution of Kentucky purported to authorize the requirement in the judgment as to the delivery of shipments from outside the State, it attempted to regulate commerce among the States; (2) that if the Constitution pur-

ported to authorize the requirement in the judgment that the railroad company should give up possession of its cars to the Southern Railway Company, it attempted to deprive the railroad company of its property without due process of law; and (3) *that the same constitutional objection applied to the attempt to make the railroad compaiy do switching work over its terminal property in Louisville between two points in the city when the shipment was neither coming into the city nor going out of the city over the lines of the said railroad.*

In passing upon the second contention of the plaintiff in error, this court refrained from saying whether or not a valid law could be passed to prevent the cost and the loss of time entailed by needless trans-shipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic, but observed that it was enough to say that such a law, if a valid one could be passed, "ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use"; and that the provisions of the Constitution of Kentucky do not afford any such protection as described. It was also said, with respect thereto, that "the want can not be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. * * * It follows that the requirement of the State Constitution can not stand alone under the Fourteenth Amendment,

and that the judgment in this respect also, being based upon it, must fall."

With respect to the third division of the judgment, which required the railroad company to do switching over its terminal property in Louisville between two points in the city when the shipment was neither coming into the city nor going out of the city over the lines of said railroad company—or, in other words, which required the railroad company to receive at its connecting point with the Southern Railway Company shipments of stock originating at the Central Stock Yards and consigned to the Bourbon Stock Yards,—the court said:

> "There remains for consideration only the third division of the judgment, which requires the plaintiff in error to receive at the connecting point, and to switch, transport and deliver all live stock consigned from the Central Stock Yards to any one at the Bourbon Stock Yards. This also is based upon the sections of the Constitution that have been quoted. If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. *To require such an acceptance from a railroad is to take its property in a very effective sense, and can not be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone.*"

Thus it is held that the imposition of "greater liabilities than those incident to its calling alone," upon a railroad company, is beyond the legitimate power of a State. If the requirement in the case just cited—that the railroad company accept at a point where it had physical connection with the Southern Railway Company shipments of stock originating at the Central Stock Yards in the city of Louisville, and transfer said shipments to the Bourbon Stock Yards in the city of Louisville, with the proviso requiring pay or tender of proper charges for the service, whenever demanded, at the time such live stock or other freight was offered—was to take the railroad company's property "in a very effective sense," and could not be justified under the law, is it not manifestly true that the policy of the State of Kentucky as announced in the opinion of the Court of Appeals in the case at bar (whereby the plaintiff in error is compelled to engage in intra-urban transportation, in competition with drays and transfer companies, contrary to the purpose for which it was organized), most effectually deprives the plaintiff in error of its property without due process of law?

While the element of competition was a factor in the decision of that case, it was not the only factor. The court held that the carrier could not be required to accept cars offered to it at arbitrary points near its terminus; and that as the carrier had established a live stock depot in Louisville where it accepted stock for shipment on its road and where it made deliveries of stock that it brought into Louisville, it could not be compelled to

make deliveries at other points in Louisville or accept shipments at connecting points with other carriers for delivery at its live stock depot. In that case the carrier had established reasonable facilities for the handling of live stock and the court decided that it could not legally be required to do more. So in the case at bar the plaintiff in error established a depot and station at Henderson ample for the accommodation of all shippers at that point; it established private loading and unloading tracks for the convenience of the larger shippers, but it was never contemplated that plaintiff in error would establish rates for and engage in the business of transportation between such tracks. To compel it to do so would be even more arbitrary and unreasonable than the requirement in the Stock Yards case, *supra*.

The opinion of the court in Grank Trunk R'y Co. v. Michigan Railroad Commission, 231 U. S. 457, does not militate against our contention here, but is, in fact, an authority in support of it. In that case the court had under consideration an order of the Michigan Railroad Commission requiring certain railroads doing an intrastate business to use their tracks within the city limits of Detroit for the interchange of intrastate traffic, and to perform an intraterminal transportation service in said city. The power exercised by the Commission was definitely authorized by statute, but the order was attacked on the ground that its enforcement would deprive the carriers of their property without due process of law.

The carriers in that case contended, in the district court, that the services required under the order were not

transportation, but that court concluded that they were transportation, and that the statute of the State validly empowered the Commission "to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission under its lawful powers, *and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage.*" The court further held that "the fact that the freight movement begins and ends within the limits of a city does not take from it its character 'of an actual transportation between two termini,' the other conditions obtaining." In these views this court concurred.

This court, in discussing the duties of the carriers with respect to the service ordered by the Commission, said:

> "The extent of Detroit is about 22 miles, and its population about 500,000. The effect of the order is simply that the companies shall accept freight at the designated points for shipment to the other designated points. This, except in an extreme sense, is not a use of the tracks and terminals; or, rather, it is only a proper use—the use for which the roads were constituted to afford. An area of 22 miles is attempted by appellants to be localized and made a destination point. A city may, in a sense, be such a terminal unit, but considering the extent of Detroit, it is competent, we think, for the State under the conditions which this record presents to consider points within it the beginning and destination of

traffic. And to call the service necessary to such intrastate movement of freight a taking of terminals is misleading and puts out of view the full signification of the question which the record presents, which is: Is there a distinct and sufficient movement between places which the companies can be required to perform, or which, to put it another way, constitutes transportation and therefore such as the companies were created to perform? That cars may be delivered or received is but an incident. The statute therefore is a regulation of the business of appellants, not an appropriation of their terminal facilities for the use and benefit of other roads."

The court then discussed the case of Wisconsin, etc., R. R. Co. v. Jacobson, 179 U. S. 287, where it upheld an order of the Minnesota Railroad Commission requiring a certain track connection, upon the ground that such legislation was valid "where a provision for regulation is reasonable and appropriate, when considered with regard to the interests both of the company and of the public." Further along in the opinion in the Grand Trunk case it is said:

"A precise distinction between facilities can neither be expressed nor enforced. Transportation is the business of railroads, and when that business may be regulated and to what extent regulated may depend upon circumstances. No inflexible principle of decision can be laid down. This was recognized in Wisconsin, etc., R. R. Co. v. Jacobson, *supra*. There the court was careful not to say that under no circumstances could an order requiring track connections between intersecting roads be a violation of constitutional rights. 'It would depend,' it was said, 'upon the facts surrounding the cases in regard to which judgment was given. * * * And in many

cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action.' "

In discussing the latter doctrine announced in the Jacobson case, the court said:

"Indeed, no case could better illustrate the value of the principle than does this case, where the exceptional situation of Detroit as shown by the record, the relation of the tracks in controversy to that situation, their lengths and their functions, as respects the commerce of Detroit which in the nature of things they perform, not merely as instruments of terminal service and delivery, but of railway transportation in the completest sense, are essential and controlling factors in the determination of the question presented."

It will be observed that the decision in that case is based on the exceptional conditions existing at Detroit, the court holding that under said conditions the order of the Commission was not unreasonable and was, therefore, a valid exercise of the authority conferred on it by statute, but further holding, as is unquestionably correct, that the reasonableness of a State order or regulation is always the test of its validity.

In the Jacobson case, *supra*, it was said:

"The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse according, as the fact may be, *whether it is a reasonable or an unreasonable exercise of legislative power over the subject-matter involved.* And in

> many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action."

And in that case the court held, without passing upon the validity of the whole act involved, with regard to all its provisions and details, that the judgment actually rendered, directing track connection to be made and affording track facilities at Hanley Falls, was not unreasonable and therefore did not violate the constitutional rights of the railroad company.

The case was distinguished from Lake Shore, etc., R'y Co. v. Smith, 173 U. S. 684, where it was held that a statute of the State of Michigan, requiring the sale of one-thousand-mile tickets at a price not exceeding $20 in the Lower Peninsula and $25 in the Upper Peninsula, was a violation of that provision of the Constitution of the United States which forbids the taking of property without due proces of law. It was said in the Jacobson case that the statute involved in the Smith case attempted to exercise "a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time"; that "it was not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the leg-

islation could be rested, unless the simple decision of the Legislature should be held to constitute such reason."

In Lake Shore & Michigan Southern R'y Co. v. Ohio, 173 U. S. 285, this court held valid a statute of the State of Ohio providing that each railway company should cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers, but the court was careful to add that "*the reasonableness or unreasonableness of a State enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the State to protect the public interests or promote the public convenience.*"

If the plaintiff in error must perform intrastation transportation at Henderson it must perform the same service at every other station on its road in Kentucky. The conditions at Henderson are not different from those at other stations in the State. If the judgment in this case is upheld then a railroad company can not permit a private spur connection with one of its tracks in its yards—either where the connection is surrounded by other spurs or sidings used exclusively in the storing of cars and the making up of trains or at any other point in its yard—without incurring the obligation of engaging as a common carrier, in the hauling of freight between such a spur and industries located on other similar spurs at the same station and in the same terminals. It

would be required to transport freight between all industries situated on the same private spur, and between all private spurs and team tracks at any station and in any terminal. There would necessarily be a large number of depots or stations in every terminal and at every station between which the railroad company could be required, as a common carrier, to haul freight. The inevitable effect of the judgment is to deprive the plaintiff in error of the right which it undoubtedly has, to establish stations at regular points from and to which it will carry freight tendered to it, and deprives it of the right to issue and enforce reasonable rules under which it will act in receiving and delivering freight at said stations. We therefore submit that said judgment, in and of itself, operates to deprive the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws.

(b) Was the service which the plaintiff in error performed for mills and elevators at Henderson tantamount to an assumption of the duties and obligations of a common carrier with respect to transporting all freight between spurs and other tracks at the Henderson station and in the Henderson terminals? This inquiry necessarily embraces the subject of the alleged unjust discrimination against the defendant in error.

It is quite true that a railroad company, when authorized by its charter, may engage in the business of intra-urban transportation of freight if it publicly professes and holds itself out as willing to engage in that business. It is also true that if a carrier performs for

some a special or unusual service, such as hauling between team tracks, or handling or assorting or assembling freight between bins or platforms at a station, it must perform the same service for all, under like circumstances; but the latter rule of law does not make a carrier a common carrier as to such special or unusual service, in the sense that it must perform the service just as it must perform ordinary transportation service between public stations.

The opinion of the Court of Appeals in this case recognizes the distinction between a transportation service and a switching service, but that court loses sight of the fact that there is a usual and ordinary transportation service, which it is the duty of the carrier to engage in, and that there is what is known as an unusual or special transportation service, with respect to which a carrier is not a common carrier, but with respect to which it, nevertheless, may not discriminate. For instance, a railroad company can not make distribution of telegraph poles and telegraph material between stations for one company without performing a similar service for a competing company. And, yet, a railroad company is not compellable, as a common carrier, to distribute telegraph poles or telegraph material between stations; nor does it become a common carrier by its action in rendering the special or unusual transportation service of transporting telegraph poles and telegraph material between stations.

There are many things which a common carrier may do, in the performance of an unusual service, which it can

not be compelled to do and with respect to which *it is not a common carrier,* but in the performance of which service it can not discriminate. In some cases it need not afford certain facilities for the receipt and delivery of freight; but if facilities are granted to one or more for that purpose, the same facilities must, upon like terms and conditions, be granted to others engaged in a similar and competing business. It may at a particular station engage in a special or unusual transportation service, which it is under no legal obligation to engage in, such as the moving of grain and milling products between private spurs at that station, with respect to which it would not be a common carrier, and, in which event, it could not be compelled to transport coal or stone or any other commodity between such private spurs at that station. So, in the case at bar, the plaintiff in error was under no legal duty to haul freight between spurs in the terminals at Henderson, and, consequently, there could be no liability on the part of the plaintiff in error for refusing to perform the service demanded by the defendant in error, unless the plaintiff in error was at that time engaged in performing, under substantially the same circumstances, a similar service for others at that station. Santa Fe, Prescott & Phoenix R'y Co. v. Grant Bros. Construction Co., 108 Pac. 467; State, *ex rel.,* Ellis v. Atlantic Coast Line Railroad, 12 L. R. A. (N. S.), 506, and note.

Whether the service the plaintiff in error performed in handling grain and milling products between spurs at Henderson was an unusual service, with respect to which

it did not assume the obligations of, and was not, a common carrier, or whether by the performance of said service the plaintiff in error assumed the obligations of a common carrier as to that service, it nevertheless had the right to refuse to transport coal from the Keystone mine to private sidings at Henderson. And its rule with respect thereto was a valid rule, of the benefit of which it could not be deprived, under the Fourteenth Amendment.

Conceding the principle announced in the first opinion of the Kentucky Court of Appeals in this case to be correct—that is, that the plaintiff in error "is under the same obligation to furnish facilities for transportation to one as it is to the other"; that "it must serve all alike,"— it was error for that court to hold that, under Sections 214 and 215 of the Constitution of Kentucky, the refusal of the plaintiff in error to perform the service demanded by the defendant in error was an unjust discrimination against him.

It was likewise error for that court to hold that the service must be performed at the rate applicable to a switching service, which latter service percedes or follows a transportation haul for which the carrier receives a transportation charge. While the court of appeals held that the switching rate was not primarily applicable to the service sought by defendant in error, still it held that said rate became applicable by reason of plaintiff in error's applying the switching rate to the handling of grain at Henderson, thus basing the decision in this respect on Sections 214 and 215 of the State Constitution.

The constitutional provisions referred to are not applicable to such a state of case as the one at bar.

They are as follows:

> "Section 214. No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."
>
> "Section 215. All railway, transfer, belt lines or railway bridge companies shall receive, load, unload, transport, haul deliver and handle freight of the same class for all persons, associations or corporations from and to the same points and upon the same conditions, in the same manner and for the same charges, and for the same method of payment."

Section 215 of the Constitution requires that all railway, transfer, belt lines or railway bridge companies shall receive, transport, haul, deliver, and handle freight *of the same class* for all persons, associations, or corporations from and to the same points *and upon the same conditions*, in the same manner and for the same charges, and for the same method of payment. Of course if the plaintiff in error in the case at bar violated Section 215 of the Constitution in that it handled freight of a certain class at Henderson for some industries and shippers there but refused to handle the *same class of freight, upon the same conditions* and in the same manner, for other industries and shippers, it also violated Section 214 of the Constitution of the State; otherwise, it did not violate said Section 214. The legislative enactments of

the State against the offense of unjust discrimination and undue or unreasonable preference or advantage are covered by Sections 817 and 818 of the Kentucky Statutes, which embrace substantially the same prohibitions as those embraced in the two sections of the Constitution referred to.

Sections 2, 3 and 4 of the Act to Regulate Commerce are almost identical in their language with the statutory and constitutional provisions of the State of Kentucky directed against unjust discrimination and undue preference on the part of common carriers. If there is any difference, the Federal Act is stricter in its terms than the provisions of the Constitution and Statutes of Kentucky. It has frequently been held, under the Act to Regulate Commerce, that not all preferences given by an interstate carrier fall within the inhibition of the provision against undue preference, but that only such preferences as are unjust and unreasonable fall within that provision.

In Interstate Commerce Commission v. B. & O. R. R. Co., 145 U. S. 263, in speaking of the provision of the Interstate Commerce Act, prohibiting undue or unreasonable preferences, the court said:

> "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * * Indeed, the possibility of just discrimination and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

In Interstate Commerce Commission v. Alabama Midland Railway Co., 69 Fed. 227, the court said:

"It may be observed that the third section of the act does not contain the words, 'under substantially similar circumstances and conditions,' and declares it to be unlawful 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The words, 'any undue or unreasonable preference or advantage,' plainly imply that every preference or advantage is not condemned, but such, only, as are undue or unreasonable."

In Texas & Pacific R'y Co. v. Interstate Commerce Commission, 162 U. S. 197, the Supreme Court held that the mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act to Regulate Commerce. In that opinion it was said:

"The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers.

> apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question."

The Interstate Commerce Commission—the highest expert tribunal in this country dealing with the complex problem of railway rates and their application to various commodities, in every section of the country—has held that the refusal to join in a through rate on one commodity while doing so on others is not a discrimination or preference where the commodities are not competitive (Clark Co. v. Lake Shore, etc., R. R. Co., 11 I. C. R. 558); and that the allowance of a privilege to all dealers in one commodity would not necessitate the allowance of the same privilege to dealers in a non-competitive commodity (Miner v. New York, etc., R. R. Co., 11 I. C. R. 422); and that no violation of Section 2 or Section 3 of the Act to Regulate Commerce is presented when no preference or discrimination between competitive articles or localities appears (Wilson Produce Co. v. Pennsylvania R. Co., 14 I. C. R. 170). Again the Interstate Commerce Commission has held that a discrimination under Section 3, to be undue, must ordinarily be such that the

prejudice arising out of it against one party is a source of advantage to the other. (Ky. R. R. Commission v. L. & N. R. R. Co., 10 I. C. Rep. 173.)

In a note to Hoover, *et al.*, v. Pennsylvania R. Co., 156 Pa. 229 (22 L. R. A. 263), there is an exceedingly interesting discussion of the subject, in which it is forcibly pointed out that there can be undue preferences and unjust discriminations only where the commodities are competitive in their character and in the uses for which they are intended.

Under the interpretation of the Interstate Commerce Act by the Interstate Commerce Commission and by this court, it is clear that railway companies have the right to make just discriminations and to give reasonable preferences in the course of their business dealings with the public.

In Interstate Commerce Commission v. B. & O. R. R. Co., *supra,* Mr. Justice Brown, in discussing Section 2 of the Act to Regulate Commerce, quotes, with approval, from the opinion of Judge Jackson in the court below, as follows:

> "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of *like kinds of traffic* under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in

undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The Court of Appeals of Kentucky itself held, in L. & N. R. R. Co. v. Commonwealth of Kentucky, 108 Ky. 628, that a railroad company could lawfully make a lower rate to a milling company that used the coal for making steam power in the manufacture of flour, which was shipped over the railroad company's road, than to a coal dealer who sold his coal for local consumption in domestic uses, and that the railroad company in making such a rate was not guilty of an unjust or unreasonable discrimination. It was decided in that case that there was no equality of conditions between the two shipments which would justify the coal dealer in demanding the rate given the manufacturer.

In L. & N. R. R. Co. v. Commonwealth of Kentucky, 105 Ky. 179, it was held by the Court of Appeals of Kentucky that it is allowable for a railroad company to classify freight according to its character and to discriminate in charges for carrying different classes or kinds, and that the practice is not only universally recognized, but plainly authorized by Section 215 of the Constitution of the State.

The plaintiff in error did not engage in the business of hauling between private spurs at Henderson freight of the same class as the freight which the defendant in error sought to have transported. The transportation of coal requires the use of a freight car of a class or type entirely different from that required for the transporta-

tion of grain. The plaintiff in error's refusal to haul *coal* between spurs at Henderson applied *to all coal dealers.* Nor did the plaintiff in error engage in the handling of any commodity between spurs at Henderson, except grain and milling products. And, manifestly, the conditions under which it handled grain and milling products were entirely different from the conditions under which defendant in error demanded that it handle coal. It not only did not handle "freight of the same class" as coal, but it did not give any undue or unreasonable preference to grain or milling products or "any particular description of traffic, in any respect whatsoever, in the transportation of *a like kind of traffic" at Henderson.* The movement of grain at Henderson was mainly and almost exclusively a service incident to a transportation service, or what might be strictly termed a "switching service." The manner of handling grain there was in its nature and purpose a milling-in-transit arrangement, which the courts recognize as valid and necessary, and which a carrier may extend to a particular kind of traffic at certain stations without affording the same privilege to non-competitive commodities at those stations. (Laurel Cotton Mills v. Gulf & S. I. R. Co., 37 Southern Rep. 134.)

The opinion of the Court of Appeals of Kentucky holds that *coal* is "freight of the same class" as grain, and that the conditions under which the defendant in error demanded the transportation of coal were the same as the conditions under which the plaintiff in error handled grain at Henderson. The decision on this point can not be justified under any fair and proper construction of

Sections 214 and 215 of the State Constitution. It is an arbitrary classification, not supported by any respectable authority. No element of similarity contemplated by the constitutional provisions referred to exists between the handling of grain at Henderson and the service demanded by the defendant in error. We therefore contend that it is not competent for the Court of Appeals of Kentucky, by a wholly erroneous construction of the provisions in question, to deprive the plaintiff in error of the right to make reasonable rules regulating the handling of freight at its stations and terminals. And we ask the court to reverse the judgment in this case on the ground that said provisions as construed in said judgment are contrary to the Fourteenth Amendment.

2.

THE JUDGMENT OF THE COURT OF APPEALS OF KENTUCKY ALSO VIOLATES THE FOURTEENTH AMENDMENT BECAUSE IT REQUIRES THE PLAINTIFF IN ERROR TO PERFORM A SERVICE AT A RATE THAT DOES NOT AFFORD REASONABLE COMPENSATION FOR SUCH SERVICE.

In the opinion delivered by the Court of Appeals of Kentucky, June 21, 1912, it is said:

> "By the first amended answer, appellant simply elaborated certain averments in the second paragraph of its original answer to the effect that it was not its duty to engage in the business of transporting freight or passengers between points in the same terminal or station. In addition to these averments, the

first amended answer contained allegations to the effect that the rate of $4.00 a car was not adequate compensation for the service demanded by appellee, and that to compel appellant to perform the service at that rate would be to deprive it of its property without due process of law and to deny it the equal protection of the laws contrary to the Fourteenth Amendment of the Constitution of the United States."

Afer so stating the defense relied on by plaintiff in error in that respect, the opinion concludes the subject as follows:

"As the averments contained in the first part of the first amended answer are simply an elaboration of the defense presented by the second paragraph of the original answer, and as the court on the former appeal, in an opinion which is now the law of the case, held that they did not present a defense to the action, the further consideration of the first part of the first amended answer will be unnecessary. As to the contention that the rate of $4.00 a car is below the cost of service and therefore confiscatory, and constitutes the taking of property without due process of law, it must be borne in mind that the rate was not fixed by the Railroad Commission, but was fixed by appellant itself. The railroad company may not fix its own rates and then complain of the fact that they are confiscatory. In our former opinion we simply held that as appellant was engaged in furnishing cars for other shippers within the same territory at a rate of $4.00 a car, it was bound to furnish the same service to appellee at the same rate. This did not impose upon appellant the burden of continuing a rate that was less than the actual cost of the service. It had the right at any time to change the rate, subject to the limitation that the change should affect all shippers alike. It could not estab-

lish a certain rate for a certain service and deny to any one similarly situated and entitled to such service the benefit of such rate."

In the opinion of the Court of Appeals of March 18, 1911, it was said:

"It will be observed that the tariff rate previously quoted recites that the railroad company does not engage in the business of local switching between switches, tracks, warehouses and industries in Henderson. But we have already determined that this declaration of what service it would perform did not authorize it to refuse to carry coal from the mine to the warehouse and industries in Henderson having spur connections. Therefore, so much of the provision as asserts that it will not perform this service need not be further noticed. If the rate fixed was only for service rendered incidental to and in connection with a transportation service from which the company derived a benefit, and it was only a reasonable rate when considered in connection with the additional rate charged for transportation service, there would be much force in the argument that it was not a reasonable rate for the carriage of coal from the Keystone mine to industries in Henderson, as the company would get no other compensation from this service. But, conceding this, we are unable to relieve the company from the condition in which it voluntarily placed itself *under the mistaken assumption that it was not required to render at all such service as Higdon requested.* * * * If the appellee company had confined the transfer service to such service as was incidental to transferring cars of freight to and from its depot to mills and industries, there would be much force in the contention of counsel, but as it did not pursue this course of conduct we must treat the case as we find it and as it was made by the appellee company. The rate as

published covered all service, and did not specify what character of freight it applied to or make any distinction between corn and coal. If under this rate it was obliged to or did in its course of dealing transfer wheat, corn or other produce for certain persons from one point in Henderson to another, then it was obliged to perform this service upon the same terms and conditions for all persons demanding it, without reference to the class of freight hauled. Constitution, Sections 214, 215."

And again the court said:

> "In the case we have, our conclusion that the rate of four dollars per car was applicable to the service demanded, although it is described in the tariff sheet as 'switching service,' is largely rested *upon the ground that the company charged this rate to other shippers for a like service.*" (R., 158.)

It will be seen, from the two opinions, that it was held by the said court that, admitting that the cost of performing the service was greater than the rate of $4.00 a car, nevertheless it was the duty of the plaintiff in error to perform the service at said rate (1) because, independently of what the plaintiff in error's practice had been with reference thereto, it was primarily bound, under the law, to engage in the service; and (2) because the service demanded by defendant in error was so similar to and identical with the handling of grain and milling products at that point, by the plaintiff in error, that its refusal to render the former service was an unjust discrimination under Sections 214 and 215 of the Constitution of the State.

Neither proposition is maintainable, as we have hereinbefore endeavored to point out. The court treats as a nullity the declaration in paragraph 9 of plaintiff in error's tariff that "it does not engage in the business of local switching between switches, tracks, warehouses or industries in the Henderson terminals," and holds that, under said provision, "it said, in substance, that when it transferred cars from one industry to another in Henderson, it would charge for the service $4.00;" and that, "having so established and promulgated the rate it would charge, without any attempt to designate the character of freight it would transport for this charge," it could not lawfully limit the application of said rate to any particular article.

The tariff provision in question applied exclusively to an optional switching service, every feature of which is distinguishable from the transportation service demanded by the defendant in error. The declaration of the Court of Appeals to the contrary, and its arbitrary and unreasonable construction of a tariff provision—under which it adjudged that plaintiff in error must perform a transportation service at an unreasonably low rate—are, we submit, nothing less than the taking of the private property of the plaintiff in error, for the private use of another, without due process of law.

It is true that the court held that the plaintiff in error had the right to make reasonable classifications of freight and to charge different rates for different classifications; but it is expressly held that the service demanded by the defendant in error was similar to

and identical with the handling of grain and milling products at Henderson, and that the plaintiff in error was primarily liable on the ground that it was its duty, under the law, to render the service, independently of its dealings with other shippers at that point; and also liable on the ground that, regardless of whether it was the plaintiff in error's duty primarily to render the service, having engaged in the handling of grain at that point, it thereby obligated itself to render the service demanded by defendant in error, and its refusal to do so was a violation of the Constitution of the State, thus holding, on the latter point, that the duty arose out of the similarity of the service to its method of handling grain at that station.

If the court's interpretation of Sections 214 and 215 of the Constitution of the State is correct as applied to the two services at Henderson, then, under the terms of said provisions, there could be no different classification of the two services, authorizing the charging of a higher or a lower rate for the one than for the other. Accordingly, the tariff rate for each must be the same, even though the rate for the handling of grain, considered in connection with the transportation haul and the charge the carrier would receive therefor, was a reasonable rate for the service, and the rate for handling coal was unreasonably low, which is conceded in the court's opinion. The result is that plaintiff in error is required to perform the service at a rate far below a reasonable return for said service; when, in fact, the plaintiff in error did

not engage in such service and had no rate applicable to it.

In Missouri Pacific R'y Co. v. Nebraska, 164 U. S. 403, this court held unconstitutional an order of the Nebraska State Board of Transportation requiring the railroad company to surrender part of its lands for the purpose of building and maintaining a grain elevator, and declared that the order constituted a taking of property without due process of law. The order was made under the Nebraska statute forbidding discrimination by carriers, and was based on the theory that the railway company had granted similar privileges to other persons.

While in that case the order of the State Board of Transportation required the railway company to surrender part of its land to an association for the purpose of erecting and maintaining a building thereon, and, whereas, in the case at bar, the judgment of the State court simply requires that the plaintiff in error perform for the defendant in error a transportation service at an unreasonably low rate—or, at the rate which the plaintiff in error received for the handling of grain and milling products, on which it also received a transportation haul and rate,—the latter requirement is none the less a taking of the private property of the plaintiff in error for the private use of the defendant in error, without due process of law. And there is, within the meaning of the Constitution, no distinction between the taking of the private property of one person and giving it to another, without making just compensation therefor, and a requirement whereby a common carrier is compelled, as

such, to perform a transportation service at a rate less than the cost of the service.

In that case the act which deprived the Missouri Pacific Railway of its property was an order made by the Nebraska State Board of Transportation, based on a Nebraska statute forbidding discrimination by carriers. In the case at bar, the judgment of the court is based largely upon Sections 214 and 215 of the Constitution of Kentucky, prohibiting discrimination by carriers. The provisions of the Constitution of Kentucky are, as we contend, not at all applicable to the case at bar; but, in so far as they are construed by the court in this case to be applicable to it, they are, we submit, repugnant to the Fourteenth Amendment.

In Lake Shore & M. S. R'y Co. v. Smith, 173 U. S. 684, hereinbefore referred to, it was said:

> "A railroad company, although a *quasi* public corporation, and although it operates a public highway (Cherokee Nation v. Southern Kansas Railway, 135 U. S. 641; Lake Shore, etc., Railway v. Ohio, 173 U. S. 285, 301), has, nevertheless, rights which the Legislature can not take away without a violation of the Federal Constitution, as stated in Smyth v. Ames, 169 U. S. 466, 544. A corporation is a person within the protection of the Fourteenth Amendment. Minneapolis & St. Louis Railway v. Beckwith, 129 U. S. 26; Smith v. Ames, 169 U. S. 466, 522, 526. Although it is under governmental control, that control must be exercised with due regard to constitutional guarantees for the protection of its property.
>
> "* * * It thus invades the general right of a company to conduct and manage its own affairs, and

compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law."

And again, in the same case, the court said:

"If the Legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high, in the judgment of the Legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it can not enact a law, making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the Legislature can not thus interfere with the conduct of the affairs of corporations."

In answer to the suggestion that the company had voluntarily sold thousand-mile tickets good for a year from the time of their sale, the court said:

"What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a Legislature. Persons may voluntarily contract to do what no Legislature would have the right to compel them to do. Nor does it furnish a

> standard by which to measure the reasonableness of the matter exacted by the Legislature. The action of the company upon its own volition, purely as a matter of internal administration and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a Legislature to pass a statute in relation to the same business imposing additional burdens upon the company."

In Chicago, Milwaukee & St. Paul R'y Co. v. Minnesota, 134 U. S. 418, this court had under consideration the validity of a statute of the State of Minnesota which provided that the Railroad Commission should fix the rate of charges for the transportation of property within the State, and that the rate so established should not be open to judicial inquiry as to reasonableness. In holding the act in conflict with the Constitution of the United States as depriving the company of its property without due process of law and depriving it of the equal protection of the laws, the court said:

> "Under pretense of regulating fares and freights the State can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

In Attorney-General v. Old Colony Railroad Co., 22 L. R. A. 112, the Supreme Court of Massachusetts considered a statute of that State requiring railroad companies to issue mileage tickets and to receive those of other roads in payment of fare, without providing any fund for their redemption, or making them a lien on any

tangible property, or putting any limit on the number of them which might be issued, or the time within which they could be used. The court held the statute an appropriation of individual property to public use without the owner's consent, and without legal provision for reasonable compensation therefor, and therefore unconstitutional.

In Smyth v. Ames, 169 U. S. 466, it was held, that a regulation made under the authority of a State enactment establishing rates for the transportation of persons or property by railroad that will not permit the carrier to earn such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws; that what the carrier is entitled to ask and receive is a fair return upon the value of that which it employs for the public convenience.

In the same case it was held that, while a State has power to fix the charges made by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by valid contract, or unless what is done amounts to a regulation of interstate commerce, such power is not without limit, and that the State can not require a railroad corporation to carry persons or property without reward, nor can it do that which in law amounts to the taking of private property for public use without just compensation, or without due process of law.

See, also, Railroad Commission Cases, 116 U. S. 307; Dow v. Beidelman, 125 U. S. 680, and Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174.

Minneapolis & St. Louis Railroad Co. v. Minnesota, 186 U. S. 257, is not in conflict with our contention here. There, the railroad company introduced evidence to the effect that if the rates upon all merchandise were fixed at the amount imposed by the Commission upon coal in carload lots, the road would not pay its operating expenses. After quoting the rule announced in the Smyth v. Ames case, *supra*, the court said:

> "and if, upon examining the tariffs of a certain road, the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. It sometimes happens that, for purposes of ultimate profit and of building up a future trade, railways carry both freight and passengers at a positive loss; *and while it may not be within the power of the Commission to compel such a tariff*, it would not upon the other hand be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders."

The court in that case recognizes that it is not within the power of a State to compel an unreasonably low

rate, even though the railroad company might itself, for the purpose of building up a profitable trade in the future, voluntarily establish such a rate.

Nor is the case of Atlantic Coast Line Railroad Co. v. North Carolina Corporation Commission, 206 U. S. 1, in conflict with our contention here. In that case it was simply held that the power of a State Railroad Commission to compel a railroad company to make reasonable connection with other roads, so as to promote the convenience of the traveling public, was ample, even though in complying with the rule of the Commission the railroad company might sustain some pecuniary loss. That was a question of requiring the railroad company to perform one of its primal duties to the traveling public.

3.

SECTIONS 214 AND 215 OF THE CONSTITUTION OF KENTUCKY AS CONSTRUED BY THE COURT OF APPEALS OF THAT STATE IN THIS CASE, AND THE JUDGMENT OF SAID COURT IN THIS CASE, IMPOSE AN UNREASONABLE BURDEN UPON THE INTERSTATE COMMERCE OF PLAINTIFF IN ERROR, AND, THEREFORE, VIOLATE SUBSECTION 3, SECTION 8, ARTICLE I, OF THE CONSTITUTION OF THE UNITED STATES.

After setting out in the amended answer tendered September 11, 1911, its duties and obligations respecting the handling of freight at Henderson, Ky., independently of and also in connection with its practices there, the plaintiff in error alleged:

"that to require the defendant to perform the service for the plaintiff would impose upon the defendant the duty of performing a like service for other shippers at Henderson and a like service at other points on the line of defendant's road in Kentucky, and would impose upon the defendant an unreasonable, unjustifiable, and unwarrantable duty, which it, as a common carrier, is not required to perform, and would be a direct and unreasonable and unwarrantable interference with its interstate business and its duties as a carrier of interstate commerce."

The averments of said amended answer were admitted to be true by the Court of Appeals in its opinion, and disposed of by that court in the following language:

"Nor does the second amended answer present a defense. The service to which appellee was entitled was wholly within the State of Kentucky. The shipments were intrastate shipments. The interstate commerce business of appellant was in no way involved. Appellant was as much bound to obey the constitution and the laws of this State with reference to intrastate shipments as it was the acts of Congress with reference to interstate shipments. It could not escape its *obligations under either law upon the theory that obedience thereto would impose upon it a burden with respect to the other.* It has never been regarded as a burden on interstate commerce to require a carrier to obey the State Constitution with reference to purely intrastate shipments. The contention is certainly novel that to perform a service wholly within the State at a given rate for certain shipments is altogether proper, while the performance of the same service for another shipper similarly situated imposes an unnecessary and unreasonable burden upon the interstate commerce business of the railroad company.

> "As neither the amended answer not the second amended answer presented a defense to the action, it follows that the trial court did not err in refusing to permit them to be filed."

The court's ruling on this point was clearly error, reviewable by this court.

Whether the court's ruling was based on the theory that it was the primary duty of plaintiff in error to perform transportation hauls between industrial switches at small stations on its line of road in Kentucky, or on the theory that by its handling of grain at Henderson—which was mainly and almost exclusively incident to a transportation haul on said grain—the plaintiff in error thereby obligated itself, under the Constitution of the State, to engage in the business of intrastation transportation, the ruling was, nevertheless, erroneous, as it assumes unlimited power in the State to regulate the intrastate business, and the instrumentalities connected therewith, of an interstate carrier, regardless of the effect of such regulation upon the interstate business of such carriers.

The Congress of the United States, by an Act to Regulate Commerce, approved February 4, 1887, effective April 5, 1887, as amended June 29, 1906, April 13, 1908, and June 18, 1910, respectively, assumed complete and exclusive control over commerce among the several States of the Union, as authorized by the Constitution of the United States. Its power of exclusive control extends not only to interstate commerce itself, but to the instruments used in such commerce. The requirement of

the judgment in this case compelling the plaintiff in error, as a common carrier, to engage in the business of intra-urban, or intrastation, transportation in Kentucky, would unquestionably—as alleged in the aforesaid amended answer—operate to the prejudice of the interstate commerce shippers on the plaintiff in error's road, in that it would deprive them of the same proportion of equipment and facilities as that enjoyed by intrastate shippers, and would impose upon interstate commerce a burden not imposed upon intrastate commerce. The opinion, recognizing this to be true, nevertheless holds that the requirement is valid.

It is, under the Constitution of Kentucky as construed by the Court of Appeals in this case, the duty of the plaintiff in error to perform intrastation transportation at Henderson, in competition with drays and teams; and, inasmuch as it has been so adjudged in this case, it follows that the same duty rests upon the plaintiff in error at every other station on its line of road in Kentucky. Plaintiff in error must, therefore, take from its legitimate intrastate business and interstate business the equipment necessary to the proper conduct of such business, and utilize the same in transporting freight between sidings at its numerous stations in the State—which will, obviously, deprive its interstate shippers of their fair and just proportion of the maximum equipment and service that the plaintiff in error is able to furnish its shippers of all classes.

In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, the court, in describing the power of Congress over commerce, said:

> "The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control *all the instrumentalities by which that commerce may be carried on*, and the means by which it may be aided and encouraged. * * * Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by State legislation. Otherwise, there would be no protection against conflicting regulations of different States, each legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress."

In McNeill v. Southern Railway Co., 202 U. S. 543, it was held that while a State in the exercise of its police power may confer power on an administrative agency to make reasonable regulations as to the place, time and manner of delivering merchandise moving in channels of interstate commerce, any regulation which directly burdens interstate commerce is a regulation thereof and repugnant to the Constitution of the United States, and it was held that an order of the North Carolina Corporation Commission requiring a railway company to deliver

cars from another State to a consignee on a private siding beyond its own right of way was a burden on interstate commerce and therefore void.

In Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, it was held that a statute of the State of Indiana which required telegraph companies to deliver dispatches by messenger to the persons to whom the same were addressed, or to their agents, provided they resided within one mile of the telegraph station or within the city or town in which such station was, was in conflict with the clause of the Constitution of the United States which vests in Congress the power to regulate commerce among the States. The statute was upheld by the Supreme Court of Indiana on the ground that it was a valid exercise of the police power of the State. In disposing of that contention, Mr. Justice Field said:

> "Undoubtedly, under the reserve powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace and protection of the community. The subjects upon which the State may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation, *that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution.*"

In St. Louis Southwestern R'y Co. v. State of Arkansas, 217 U. S. 136, the court had under consideration a State statute and a rule promulgated by the Railroad Commission of Arkansas requiring railroad companies to deliver freight cars to a shipper within five days after

written application therefor, for the purpose of enabling the shipper to load freight. A complaint was filed before the Commission charging the St. Louis Southwestern R'y Co. with having violated the rule. The Commission found against the railway company, and also found that by the violation of the statute and of the rule of the Commission the railway company had become subject to penalties in favor of the State of Arkansas, as provided in a statute of that State. The prosecuting attorney for the proper county commenced an action in the name of the State against the railway company to recover penalties. The railway company filed an answer to the proceedings instituted on behalf of the State, in which it alleged that it was impossible for the company to comply with the rule in question without discriminating against its interstate commerce shippers, and that therefore obedience to the rule would result in a direct burden upon interstate commerce. In holding that the statute and the rule were invalid because they imposed a direct burden upon interstate commerce, the court said:

> "Coming to the merits, we think it needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the State to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. * * * In the nature of things, as the rules and regulations of the association concern mat-

ters of interstate commerce inherently within Federal control, the power to determine their sufficiency we think was primarily vested in the body upon whom Congress has conferred authority in that regard."

The case of L. & N. R. R. Co. v. Eubank, 184 U. S. 27, involved Section 218 of the Constitution of Kentucky as construed by the Simpson Circuit Court of that State with reference to interstate commerce. It was claimed by Eubank in that case, in the court below, that the Louisville & Nashville Railroad Company charged for shipping tobacco from Franklin, Ky., to Louisville, Ky., intrastate, 25 cents per hundred pounds, and that at the same time it charged for shipping tobacco from Nashville, Tenn., over a longer route including the same route, to Louisville, Ky., the sum of 12 cents per hundred pounds, and Eubank averred that the company had no right to charge a greater rate for transporting tobacco from Franklin, Ky., to Louisville, Ky., than 12 cents per hundred pounds—the rate from Nashville, Tenn., to Louisville, Ky.—and that the charging of a greater rate was prohibited by Section 218 of the Constitution of the State. The court below sustained the contention made by Eubank, but this court held that the necessary result of enforcing the provisions of Section 218 of the Constitution of the State in that case was to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, and that it thereby affected, and to that extent directly regulated, interstate commerce, and that the provision as applied in that case was invalid.

In Atlantic Coast Line Railroad Co. v. Wharton, etc., 207 U. S. 328, it was held that where a carrier afforded adequate local facilities at a station, a statute of the State and an order of the Railroad Commission, made thereunder, directing the stopping of interstate trains at such station, was a direct regulation of interstate commerce. It was also held that while the sufficiency of the trains afforded at such local stations is not of itself a Federal question, it may be considered by this court for the purpose of determining whether the order does or does not regulate interstate commerce, and if, as in that case, the local facilities are adequate, the order is void. The opinion strongly intimates that, independently of the question of whether the train was an interstate train, the order was not a valid one. In the opinion it is said:

> "Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accommodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is, therefore, not a valid one."

Herndon v. Chicago, R. I. & Pacific R'y, 218 U. S. 135, was a suit brought by the defendant in error to enjoin the execution of certain provisions of the acts of the Legislature of the State of Missouri, as violative of complainant's rights under the Federal Constitution. In the

bill of complaint it was averred by said railway company that to stop the through interstate trains running between Chicago, Fort Worth and Dallas, Texas, and between Chicago and the Pacific Coast would be a direct, unreasonable and unwarrantable interference with its interstate business, and that said through trains were maintained for and were essential to the purpose of transporting interstate passenger traffic, and for the carriage of the United States mails; and, further, that if the said through trains were required to stop at all junctions with other railways and there interchange passengers with such road, their usefulness as through trains would be destroyed, and the interstate business of the complainant interfered with to an unwarrantable extent without any corresponding benefit to the traveling public, etc. A demurrer was filed to the bill, which was overruled, and a final decree was entered, enjoining the enforcement of the statute. In the opinion in that case the court said:

> "The contention is that the amendment of 1907 has only the effect to bring into the statute certain provisions as to branch railroads. Assuming this to be a correct interpretation of this statute, and that it only requires the stoppage of trains at Lathrop carrying passengers destined for points on the intersecting railroad, or to take up passengers there destined for points on complainant's road, the question remains, Would the requirement of the Act of March 19, 1907, to stop the through trains described in the bill for such purpose and under the circumstances set forth, be an unlawful attempt to regulate interstate commerce and impose an unlawful burden thereon?

"The extent of the right to control through interstate transportation of passengers by State legislation, or under orders of a commission authorized by the State, has been recently before this court. Miss. R. R. Co. v. Illinois Central R. R. Co., 203 U. S. 335; Atlantic Coast Line Co. v. Wharton, 207 U. S. 328.

"The principle to be deduced from these cases is, that where a railroad company has already provided ample facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, a State regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce. Applying the principles thus settled and taking the allegations of the bill as true, which we must do in view of the fact that the case was decided upon demurrer, we think that construing the statute so as to require the stoppage of the through trains whenever any person might seek to avail themselves thereof, in order to permit a transfer of passengers from one road to the other upon such trains, would be an unnecessary and unlawful burden upon interstate traffic."

It was held in Mississippi Railroad Commission v. Illinois Central Railroad Co., 203 U. S. 335, that while a State railroad commission may, in the absence of congressional legislation, order a railroad company to stop interstate trains at stations where there is only an incidental interference with interstate commerce, based on a legal exercise of the police power of the State exerted to secure proper facilities for the citizens of the State,

where the railroad company had—as in that case—furnished all proper and reasonable facilities, such an order was an improper and illegal interference with interstate commerce and void as a violation of the commerce clause of the Constitution; also that in reviewing statutes of that nature, and orders made by railroad commissions, it frequently became necessary *to examine the facts* upon which they rested and to determine from such examination whether there was an unconstitutional exercise of power and an illegal interference by the State or its Commission with the interstate commerce of the railroad. It was also held in that case that the order could not be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes; that it was a question whether trains could be stopped at any particular station when proper and adequate facilities were otherwise afforded such station. The court said:

> "If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined and the train turned from a through to a local one in Mississippi. The legislature of a State could not itself make such an order, and it can not delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished."

Thus, it was held that the order of the Commission could not be viewed alone in the light of the effects of that particular order, but must be considered in the light of what the Commission would be authorized to do in fur-

ther exercising the same power that it was then exercising. So, also, must the policy of the State of Kentucky as announced by the opinion of the court in this case be viewed, not alone in the light of what it will impose upon the plaintiff in error at Henderson, Ky., but in the light of what plaintiff in error's duty will be at every station in Kentucky. And, considered from that view, it is manifestly an appropriation of the equipment and facilities of the plaintiff in error to an intrastation-transportation service, and necessarily, therefore, lessens the ability of the plaintiff in error to carry on properly its interstate business.

It is true that, in the case at bar, the requirement is intended to apply only to intrastate or intrastation movements of freight, and that in many of the cases cited the regulation or order was applicable to an interstate movement. The test of the validity of a State regulation, however is not whether the requirement was intended to apply, and by its terms only applies, to intrastate commerce, but is whether by its enforcement as against the purely intrastate business of a carrier there is imposed upon the carrier's interstate commerce an unreasonable burden. The plaintiff in error's equipment and facilities for transporting freight are used jointly in intrastate and in interstate commerce; and to deprive it of the right to use the same impartially in the transportation of both kinds—even though the State in so doing act under a regulation only directly applicable to equipment in intrastate commerce—is as illegal as if the State regulation were directed solely against interstate commerce.

It was alleged in the amended answer referred to, and is admitted in the opinion of the State court, that to compel the plaintiff in error to engage in intrastation transportation would seriously interfere with its interstate commerce. But, notwithstanding that admitted fact, it was decided by the State court in this case that the plaintiff in error must engage in intrastation transportation of freight at Henderson, Ky.,—and necessarily, therefore, at other points in the State—or submit to awards of damages for refusing to engage in such transportation. The effect of the decision, therefore, is to compel the plaintiff in error to withdraw from its interstate business much of the equipment needed and used therein, in order that it may be able to meet the demands for intrastation service. In this respect the decision and the judgment of the State court impose a direct and unreasonable burden upon interstate commerce, and are contrary to the commerce clause of the Constitution.

We respectfully submit that the judgment in this case is contrary to the law and should not be upheld and we ask the court to reverse said judgment and direct the Court of Appeals of Kentucky to set it aside and to enter a judgment dismissing the petition of defendant in error.

Respectfully submitted,

BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

YEAMAN & YEAMAN,
EDWARD S. JOUETT,
WM. A. COLSTON,
HENRY L. STONE,
Of Counsel.

No. 322.

Supreme Court of the United States

OCTOBER TERM, 191[illegible]

Office Supreme Court, U. S.
FILED
MAR 28 1914
JAMES D. MAHER
CLERK

LOUISVILLE & NASHVILLE RAILROAD COMPANY.....*Plaintiff in Error*

Vs.

JOE HIGDON (Doing Business Under the Firm Name of Crescent Coal Company.....*Defendant in Error*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Argument for Defendant in Error

J. F. CLAY
A. Y. CLAY
Of Counsel

JAS. W. CLAY
Counsel for Defendant
In Error

GLEANER PRINT, HENDERSON, KY.

INDEX TO QUESTIONS DISCUSSED AND AUTHORITIES CITED.

Pages
Statement of the Case.....3 to 15

I.

A common carrier may have and may operate its terminal facilities for its own convenience. It may have the right to refuse the use of these facilities for local shipments, between industries within the terminal limits of Henderson; but when it furnishes cars and transports same from one industry to another in such terminal limits, having physical connection with its road, it is bound to perform similar service for all having such connection. It is therefore the duty of the plaintiff in error in this case to accept and transport the coal of the defendant in

error .....15 to 38
Constitution of Kentucky, Sec. 213.....17
Same, Secs. 214, 215.....19
Same, Sec. 196.....24
Kentucky Statutes, Section 818.....25
Louisville & Nashville R. R. Co. vs. Central Stock Yards Co., 212 U. S., 138.....35
Bedford Bowling Green Stone Co. vs. Oman, etc., 115 Ky., 369 30
Louisville & Nashville R. R. Co. vs. Pittsburg & K. Coal Co., 111 Ky., 960.....30
Straight Creek Coal & M. Co. vs. Straight Creek C. & C. Co., 135 Ky., 536.....30
McDuffe vs. Portland R. R. Co., 52 N. H. 430; 18 AM. Rep. 72 31
Louisville & Nashville R. R. Co. vs. Garrett, 231 U. S. 7.....29
Union Pacific R. R. Co. vs Goodridge, 149 U. S. 681.....32

Interstate Stock Yards Co. vs. Indianapolis Union R. R. Co., 99 Fed. 472 33
Barden & Swarthout vs. LeHigh Valley R. R. Co., 12 I. C. C. R., 194 33
Louisville & Nashville R. R. Co. vs. Ky 183 U. S. 503.....36
Keystone M. & M. Co. vs. L. & N. R. R. Co., decided by State Railroad Commission, Nov. 30, 1909.....36
Grand Trunk R. R. vs. Michigan R. Com., 231 U. S. 457.....34
Minneapolis & St. L. R. Co. vs. Minnesota, 186 U. S. 257....36
Alabama & V. R. Co. vs. Mississippi R. Com., 203 U. S. 469..36
Northern P. R. Co. vs. North Dakota, 216 U. S. 579.....36

II.

Having established a flat rate of two dollars per car, plus two dollars per car for car rental, for all commodities where such service is performed, it was legally bound to perform the same service for the defendant in error at that rate....38 to 46
Alabama &c R. R. Co. vs. Railroad Com. of Mississippi, 203 U. S., 496.....39
Wight vs. United States, 167 U. S. 512.....39
Augusta Brokerage Co. vs. Central of Georgia R. R. Co., 62 S. E., 996.....40
A. W. Ass'n vs. I. C. R. R. Co., 7 I. C. R. 564.....40
Hilton Lumber Co. vs. Atlantic Coast Line R. R. Co., 6 L. R. A., (N. S.) 225.....40
Straight Creek Coal M. Co. vs. Straight Creek Coal & C. Co., supra 46

III.

Where a carrier demands and receives a higher price for its service than it is legally intitled to charge, the excess paid may be recovered. Where, however, it refuses to perform the service, and the shipper, by reason thereof, has to pay a higher price or a higher rate, to obtain delivery, from or to other sources, the carrier is liable for the difference between what the shipper would have had to pay if the service had been performed, and what he necessarily did have to pay by reason of the refusal of the carrier to perform the service.....47 to 50
Louisville & N. R. R. Co. vs Walker, 110 Ky., 965.....48

Supreme Court of the United States

LOUISVILLE & NASHVILLE RAILROAD COMPANY
.....*Plaintiff in Error*

Vs.

JOE HIGDON (Doing Business Under the Firm Name of Crescent Coal Company.....*Defendant in Error*

ARGUMENT FOR DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

STATEMENT.

The Defendant in Error is a coal dealer in the city of Henderson, Ky., doing business under the name of the Crescent Coal Co. He buys and sells both steam and domestic coal, in car load lots, and domestic coal by the wagon load. On the 14th day of May, 1908, he made and entered into a written contract with the Keystone Mining & Manufacturing Co. for twenty thousand tons of coal, to be delivered to him, F. O. B. cars, on the L. & N. railroad at the mine. Deliveries under this contract were to begin July 1st, 1908, and were to be made at the rate

of not exceeding two thousand tons per month, the whole to be taken and delivered by the 1st day of July, 1909. He was also given the privilege of renewing the contract for another year on the same terms and conditions. He made a further and additional contract with the same company, by which he was appointed sales agent, for the handling and sale of any quantity of coal in excess of twenty thousand tons which he might sell, and which the company could furnish.

The offer of this contract was made to him in the form of a written proposition submitted to his attorneys for their acceptance. After the proposition was made, and before its acceptance, he went to large consumers of steam coal and made contracts to furnish them their year's supply of coal up to a total amount of about seventeen thousand tons, to be delivered in car load lots. After he had done this, he then accepted the written proposition, and the contract with the Keystone Mining & Manufacturing Co. was then closed up and signed.

The mine of the Keystone Mining & Manufacturing Co. is located in the city of Henderson, Ky., and within the switching or terminal limits of the L. & N. railroad company. It is a commercial mine, and is fully equipped for loading coal into railroad cars at its mine, being connected by switch leading from its mine, to the main track of the Louisville & Nashville Railroad Company.

All coal consumers, with whom Higdon made contracts for their year's supply of coal, were likewise prepared to receive the coal delivered to them in car load lots. They were all located on sidings which connected with the railroad track

of the Louisville & Nashville Railroad Co. Among the largest of these consumers were the Municipal Electric Light and Power plant, the mill and plant of A. Waller & Co., millers and grain dealers, and the elevator plant of the Henderson Elevator Co., grain dealers, and others. All had physical connection with the tracks of the Plaintiff in Error.

Between the time the written proposition above mentioned was made, and its acceptance by Higdon, he ordered a car load of coal from the Keystone Mining & Manufacturing Co., and ordered the Louisville & Nashville Railroad Company to place a car to receive the coal, to be switched or transported and delivered to the Electric Light plant. The railroad company performed this service, and charged him therefor, two dollars for the rental of the car, and two dollars for switching the same, making a total charge for the whole service of four ($4.00) dollars. Prior to this time Mr. Malcolm Bullitt, President of the Henderson Elevator Co., had likewise ordered a car placed to be loaded with coal by the Keystone Company, and switched to the Elevator plant. The Louisville & Nashville Railroad Company had furnished the car and performed this service at the same rate of two dollars for rental of the car and two dollars for switching, making a total of four ($4.00) dollars for the whole service. Higdon, in addition to carrying on the coal business, is also employed by the Henderson Elevator Co., and knew of this service by the railroad company, before signing the contract with the Keystone Mining & Manufacturing Company.

On the 1st day of July, 1908, Higdon ordered from the railroad company two empty coal cars, to be placed at the mine

of the Keystone Mining & Manufacturing Co.—there to be loaded with coal, and when loaded to be switched or transported to the electric light plant. At different times he ordered other cars for delivery of coal to the plants of A. Waller & Co., and the Henderson Elevator Co. From the 1st day of July to the 13th of July, the railroad company refused to furnish any of these cars, or to perform any of this service at any price. On the 13th day of July, however, the company did offer to furnish cars and switch the same from the Keystone Mine to industrial plants on its road inside the switching limits, provided Higdon would accept and pay it a rate of fifty cents per ton. The evidence shows that the average coal car will hold 80,000 pounds of coal, or 40 tons, and at the rate quoted by the Railroad Company, Higdon would have had to pay twenty ($20.00) dollars per car, if he accepted this rate. Higdon thereupon demanded of the railroad company, the authority or tariff fixing this rate, and insisted on the railroad company performing the service at the same rate charged other shippers and communities, viz: Two ($2.00) dollars per car rental, and two ($2.00) dollars per car for the service of transporting or switching the same. Finally, on August 13, 1908, the company notified Higdon that it withdrew its offer to perform the service at fifty cents per ton, and that it would not furnish the cars or perform the service at all for any price. Higdon thereafter continued his efforts to get the railroad company to furnish the cars and perform the service. In these efforts, he was supported and aided by the Keystone Mining & Manufacturing Company, who were continually demanding cars to fill the orders of Higdon. To all these efforts

the railroad company turned a deaf ear, and paid no attention to their demands.

Now, there are several mines in the city, or within the terminal or switching limits of the city, but none of them are connected by switch with the railroad tracks. The Keystone Mine is the only one having this physical connection. The contract between Higdon and The Keystone Mining & Manufacturing Co. was for coal in car lots, F. O. B. the mine. The contracts between Higdon and his customers were for coal delivered in car load lots on the switch at their plants. By the refusal of the railroad company to furnish cars at the Keystone Mine, to be loaded with coal and switched or transported to his customers, he was prevented from getting the coal for which he had contracted, but, notwithstanding, he was compelled to fill his contracts with his customers, and furnish them with coal.

When the railroad company refused to furnish the cars or switch the same at any price, or on any terms, thus preventing Higdon from getting his coal in the city of Henderson, he had to look elsewhere and obtain his coal from other sources outside of Henderson mines. The evidence shows that the nearest commercial mines were at Sebree and other points beyond Sebree toward Madisonville, Earlington and other points, largely controlled by the St. Bernard Mining Co.; coal shipments from which are covered by a blanket rate of fifty cents per ton. In order to get his coal, or any coal, to fill his orders, he was compelled to and did pay this rate. Upon the basis of four dollars per car, the average rate would have been ten cents per ton, and when Higdon was compelled to go elsewhere and get the coal, he had

to pay the increased freight rate of fifty cents per ton, making a difference to him of freight paid, of forty cents per ton upon every ton of coal sold by him during the year. After making his contract of purchase with the Keystone Company, he made his contracts of sale with consumers at a price which would have netted him a profit of forty cents per ton, after paying a freight rate of ten cents per ton; in-stead of making this profit, or any profit, he was compelled to pay the whole of it to the railroad company, and with most of his year's business, he was compelled to and did deliver his contract customers their coal at the same price it cost him. During part of the season, for a small portion of his supply, he states that he got coal at a slightly reduced price, and made five cents a ton on a small part, but upon all he had to pay the increased freight rate of fifty cents, instead of ten cents per ton, the amount he would have paid if the railroad company had complied with what we maintain, was its legal obligation. By reason of the refusal of the railroad company to furnish cars and switch the same from the Keystone Mine to the various plants in the city, having physical connection with its road, the railroad company received, and Higbee was compelled to pay, forty cents per ton more on 8,581 tons of coal than he would have had to pay if the railroad company had performed that service.

The general defense of the railroad company was predicated upon the plea that the railroad company is, and was, under no legal obligation to furnish cars for coal to be transported or switched from one industry to another, within the switching limits of the city of Henderson. Before entering upon an argu-

ment of this and other questions involved, we wish to present to the court these further facts:

The switches, main tracks and spurs of the railroad company in the city of Henderson, constituting its terminal tracks, are almost in the shape of a horse-shoe. The first spur starts at the Ohio river at the foot of Fourth street, and runs from thence in a southeasterly direction out Fourth street to a junction with the main track near the freight depot of the railroad company. The main track then continues the same course until the passenger station is reached, after passing which it curves southward and continues out past the plant of the Keystone Mining & Manufacturing Co. At or near this plant, another spur leaves the main track, and after circling a short distance, strikes a straight northwest course down Plum and Audubon streets to a point near the river bank. These tracks, with their sidings and spurs, are known locally as the "belt line." Along this belt line are located a large number of the industrial plants of the city. Among which, the record shows, are the following, having physical connection therewith by switch reaching from their plants to the railroad, to-wit:

B. B. Johnson & Son; Henderson Brewing Co.; Henderson Electric Light Plant; A. Walker & Co.; Henderson Elevator Co.; Geo. Delker Company; Henderson (or Sandefur's) Roller Mills; Worsham (or Kraver's) Distilling Company; Henderson Mining or Manufacturing Co. Ice Plant; Henderson Cotton Mills; Marstall Furniture Company; Coquillard Wagon Works; Henderson Desk Company; Anderson Box & Basket Co.; The City (or Farless) Mill; Wm. Elliott Tobacco Factory; John H. Hodge

Tobacco Factory; Thos. Hodge Tobacco Factory; Gallaher Limited Tobacco Factory; Henderson Brick Co.

In addition to the above, the coal yard of R. A. Powell, agent for the St. Bernard Mining Co., is located on it, and is connected with it, as is also the mine of the Keystone Mining & Manufacturing Co. All these plants are inside the switching or terminal limits of the railroad company, and the company owns and operates this "belt line," so called.

There is filed with the record in this Court, an exhibit which constitutes a part of the deposition of R. W. Powell, being a statement of the switching done by the railroad company in the terminal limits of Henderson. In this statement a number of the industrial plants are named. At other places in the record other plants are named. These plants, and their location, were known to the lower court, and are scattered from one end of this belt line to the other. The Henderson Brewing Co., and the Electric Light Plant are near the river on the first prong of the horse-shoe; then comes Powell's coal yard, the Henderson Roller Mills, the Geo. Delker Co., Waller's Mill, Waller's Elevator and the Henderson Elevator. Connected with the curve of the horse shoe are Kraver's Distillery, the Cotton Mills, Marstall's Furniture Factory, Coquillard Wagon Works, Keystone Mining & Manufacturing Company, and others. Connected with the second prong are: the Desk Factory, the Box Factory, Marshall & Alves, the City Mills, Wm. Elliott's tobacco factory, the Tobacco Extract Works and others, the last four being located at the extreme end of the second prong near the river.

It is an undisputed fact, conclusively established by the

evidence, that for several years before the time covered by this suit, during the time covered, and since that time, freight cars were furnished by the railroad to some of these industries to be loaded with some commodity, or class of freight, at some of these plants, and when loaded, were switched by the company to and delivered at some others of them. Prior to the 20th day of March, 1908, the railroad company made a flat charge for this service of two ($2.00) dollars per car; but on March 20th, 1908, a new tariff went into effect, to which we shall hereafter refer, increasing this rate to two ($2.00) dollars per car rental, and two ($2.00) dollars per car switching charge, making a total of four ($4.00) dollars per car, and this was the rate thereafter charged, and which has been ever since then charged. This is the same charge Higdon asked to be given, and is the same charge made others as shown by the evidence, and especially by the statement of switching referred to.

As above shown, the City Mills, sometimes referred to as the Farless Mill, is located at one end of the horseshoe, and the freight wharfboat, where river freight is received, at the other end. During the period covered, the City Mills bought wheat and corn up and down the Ohio river, and brought it to Henderson by barge; it was unloaded at the wharf boat and there loaded into cars furnished by the Louisville & Nashville Railroad Co. and then switched to the City Mills, passing by every industry to which Higdon wanted the railroad to deliver his coal, and passing by the mine of the Keystone Co. For this service a charge of two ($2.00) dollars per car rental, and two ($2.00) dollars per car for switching, was made.

Cars were furnished and the same service performed for A. Waller & Co., and the Henderson Elevator Co., at the same charge.

Kraver's distillery bought corn from the Henderson Elevator Company, from A. Waller & Co., and from the City Mills. Cars were furnished by defendant at all of these plants when called for, and when loaded were switched to Kraver's distillery by the defendant, and a total charge of four ($4.00) dollars was assessed and collected.

Cars were furnished and switching service performed to transport cobs from the Henderson Elevator Co. or from the Henderson Roller Mills, or from the City Mills, to A. Waller's Mill; to transport wheat or corn from all or any of the Elevators to any of the mills, or from any of the mills, to any of the elevators; to transport oats from Marshall & Alves to A. Waller & Company; to transport bran from the Henderson Roller Mills, or the City Mills, to A. Waller & Co., the Henderson Elevator Co., and Marshall & Alves; to transport hay from the river to A. Waller & Co.; sacks from all the mills and elevators to the river. In each and all of these cases, the railroad company performed the service at the price of two ($2.00) dollars per car, rental of car, and two ($2.00) dollars per car switching charge.

It is also in evidence that coal is shipped to R. A. Powell from the St. Bernard mines at Earlington, and delivered to Powell's coal yard. If Powell thereafter wishes the coal delivered to some industrial plant, the railroad company will switch the same, and has switched the same, to the Anderson Box Factory and other industries.

There is filed with the record herein exhibit No. 10, of the deposition of Joe Higdon, being Terminal Tariff of the Louisville & Nashville Railroad Co., Section 9, page 130 of that Terminal Tariff reads as follows:

> "The Louisville & Nashville Railroad does not engage in the business of local switching between switches, tracks, warehouses or industries in Henderson, Kentucky terminals, but where any such service is performed as an accommodation, a charge of two dollars per car, plus two dollars per car for car rental, shall be assessed."

This is the only tariff in force at Henderson, and it was under this provision of the tariff that all the service shown by the evidence, and particularly that shown on the "statement of switching" was done.

It is also shown that the rate on coal from Henderson, or from the Keystone Mining & Manufacturing Co., to Evansville, Ind., is forty cents per ton, or sixteen ($16.00) dollars per car. Evansville is twelve miles from Henderson, and this rate carries with it the bridge toll across the Henderson Bridge.

At page 133 of the Terminal Tariff, it is shown that at Hopkinsville, Ky., the Louisville & Nashville Railroad Co. furnishes cars and switches the same for stone and stone screenings from the Dalton Stone Co. to all industries on the tracks of the railroad company in that city.

At page 353 of the same Tariff, it is shown that at Canton, Ga., the Louisville & Nashville Railroad Co. furnishes cars for all classes of freight between all industries in the switching limits of that city, at a charge of two ($2.00) dollars per car for switching and three ($3.00) dollars per car for rental of the car.

On the same page, and for the same price, it appears that cars for coal are furnished and switched at Cotula, Tenn., from the Southern Coal & Coke Co.'s tracks to the team tracks of the L. & N., there to be unloaded.

On the same page, it appears that at Cynthiana, Ky., all classes of freight are switched from the depot of the L. & N. to all industries having private sidings, at one and 50-100 ($1.50) dollars per car.

At page 237 of the same tariff, it appears that at New Orleans, La., all classes of freight are loaded into cars and switched between industries in the terminal limits, at prices ranging from one and 50-100 ($1.50) dollars, to five ($5.00) dollars per car.

These are not only shown in the tariff mentioned, but are proven in the deposition of R. W. Powell, agent of the railroad company, as will appear from his answer to questions of his first deposition.

It is also shown that if the railroad company had furnished the cars, the Keystone Mining & Manufacturing Co. was ready, willing and able to supply the coal.

Other facts will be noted and commented upon during the argument. There is and can be, but little difference of opinion as to the evidence. Upon one or two points there is a sharp conflict, but upon the whole there is very little contradiction between the witnesses for the plaintiff, and those for the defendant.

Upon the evidence, the lower court held that plaintiff was not entitled to recover, and dismissed his petition. Upon appeal

the court of appeals held that the railroad had no right to discriminate in favor of any of its shippers similarly situated, and for years, having performed for others the services Higdon requested in the case at bar, it was bound to perform the same service for Higdon at the same rate, viz: $4.00 per car, and reversed the case. (The opinion will be found pages 151 to 159 of the Record.)

It was only after the case had been remanded to the lower court for an accounting that any constitutional question was attempted to be raised. This branch we have discussed in our brief for motion to Dismiss and Affirm.

As to the merits of the case:

I

It Was the Legal Duty of Plaintiff in Error to Furnish the Cars and Perform the Service in Question.

When a common carrier promulgates a terminal tariff, fixing a rate of four ($4.00) per car, or any other rate, for furnishing cars and performing switching service on freight between industries within such terminal limits having physical connection with its road, collecting for such service the rate fixed by its tariff, it thereby establishes itself as a common carrier within such terminal limits, and is in law bound to furnish cars and perform switching service between all other industries within such terminal limits, having similar physical connection with its road.

Under such circumstances a common carrier cannot avoid its legal obligation to furnish cars, and perform such service, by

inserting in its published tariff that it does not engage in such business, except as an accommodation. A shipment or two in an emergency or under peculiar circumstances, does not of itself establish a precedent; but when, covering a period of several years, the carrier, under the same provision, habitually accommodates some shippers of some commodities, and habitually furnishes cars and performs such switching service between some of these industries having such physical connection, it is bound in like manner to furnish cars and perform such service between other industries having similar physical connection.

A common carrier may limit its carriage to one or more commodities, and decline to carry any other. But, when it holds itself out as a common carrier of freight generally, it is bound to receive all freight tendered to it in the regular course of its business. It may advertise or hold itself out as a carrier limited to a certain freight, but if it goes beyond this, and accepts and carries freight out of the advertised class for one shipper, it is bound to carry for other shippers similary situated.

It may advertise or hold itself out as a common carrier of freight between certain points only, and if it confines itself to those points, well and good; but when it deviates from its advertised rule, and carries freight between other points for the shipper, it must carry between those same points for other shippers.

A common carrier may have its terminal facilities for its own convenience. It may have the right to refuse the use of these facilities for local shipments between industries within the terminal limits, and so long as it adheres to this policy, well

and good; but wher it departs from that policy, and permits the use of such facilities for one shipper, for the transportation of the freight of that shipper, between such industries, within such limits, then it becomes a common carrier within such limits, and must give other shippers having similar physical connection, the same service.

We are not discussing now, the rate at which such service must be performed. We recognize the right of a carrier to fix one rate for carrying one commodity, and a higher or lower rate for another commodity. That feature of the question we shall discuss under the II sub-division of our argument. Here we are discussing the naked legal question as to the legal duty of the carrier to furnish the cars, and perform the service, at some price.

It is upon the foregoing, and other general principles of the law, that we base Higdon's right of recovery. These principles are not only founded upon and derived from the common law, but in this State they are declared and fixed by express Constitutional and Statutory provisions.

Section 213 of our State Constitution is as follows:

> "All railroad, transfer, belt lines and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining or controlling, any railroad, transfer, belt line or bridge, or doing a railway business in this State, shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in car loads, or less quantities, coming to or going from any railroad, transfer, belt line, bridge or siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preferences, drawback, or rebate in favor of any person, corporation, consignee or con-

signor, in any matter as to payment, transportation, handling or delivery; and shall so receive, deliver, transfer and transport all freight as above set forth, from and to any point where there is a physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business."

This is not a mere legislative enactment. It is the voice of the Sovereign. It is the sovereign declaration of a sovereign people, made through their duly accredited representatives in convention assembled, and by them ratified at the polls. Except to the extent that the people have parted with their sovereign power to the Federal Government, it is the supreme law binding upon every citizen and subject, natural and artificial, of this Commonwealth. At a later place in the argument we shall discuss this State constitutional provision from the standpoint of the Federal Constitution. Our first purpose is to apply this provision of the Constitution to the facts of this case.

Can there be any question about its being directly applicable? For the purpose of application, we quote the part only having special reference to the facts of this case: "All railroad, transfer, belt lines and railway bridge companies, * * * shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load, and unload, all the freight in car loads or less quantities coming or going from any * * * siding thereon, with equal promptness and dispatch, and without any discrimination as to charges, preference, drawback or rebate in favor of any person, corporation, consignee or consignor, in any matter as to payment, transportation, handling or delivery."

The mine of the Keystone Mining & Manufacturing Co. is upon a siding on the railroad tracks; all the industries to which Higdon wanted shipments made were likewise upon a "siding thereon." It received and transported freight for some shippers from "sidings thereon," to "sidings thereon," but refused to receive or transport freight for Higdon. The constitutional provision required it to *receive, move, and transport all freight*, "with equal promptness and dispatch." The railroad company refused to receive, move or transport the freight of Higdon at all. It also requires the Company to *receive, move and transport all freight*, "without any discrimination as to charges, preference * * * in favor of any person * * * in any matter as to payment, transportation, handling of delivery." The railroad company received, moved and transported the freight of a large number of other shippers at a rate of four ($4.00) dollars per car, but refused to receive, transport or move the freight of Higdon at any price. This was not only a discrimination as to price, but it was a discrimination in the matter of transportation, handling and delivery.

Section 214 of the Constitution provides:

> "No railway, transfer, belt line, or railway bridge company, shall make any exclusive perferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier."

Section 215, provides:

> "All railway, transfer, belt line or railway bridge companies shall receive, load, unload, transport, haul, deliver and handle freight of the same class for all persons, associations or corporations, from and to the

same points, and upon the same conditions, in the same manner and for the same charges and for the same method of payment."

Now, the Court will notice that in the section just quoted, "freight of the same class" is designated. It will doubtless be argued that corn, wheat, bran, oats, cobs, sacks, and such commodities, are in one class, while coal is in another class. We do not agree to this; both are carried in car load lots, and it takes but a look at the two for any one to see that an open coal car costs less than a box car for handling. Upon the basis of a fair return upon the investment, therefore, if either is entitled to a preference, it should be the coal. But admitting for the sake of argument, that coal and these other commodities are not "freight of the same class." Section 215 relates to "freight of the same class." This section is complete in itself, and is a complete and perfect regulation in so far as "freight of the same class" is concerned. We, therefore, need no other provision, constitutional or statutory, to make clear the legal duty of the railroad as to "freight of the same class. That is, as between the same points, in the same way, for the same price, and for the same method of payment. This is settled by Section 215. Now as between these two points, what is to be done with other freight, which as a common carrier the company is in the habit of transporting over its road? As to that the railroad company says it does not compete with wagons. Does it cost any more to load and deliver a wagon load of wheat or corn by wagon, than it does a load of coal? Does it cost any less to furnish a box car for wheat or corn and transport the same a given distance, than it would to furnish a coal car and transport it the

same distance? Then, if it is not competing with wagons, why perform this service for the grain dealers, and not for the coal dealers? And the answer of the railroad is,—that it is interested in Henderson and wants to see its grain industry built up, *therefore it "accommodates" the grain dealers, and saves them the expensive charge of hauling their grain by wagon, but it would be no accommodation to save the coal mines or dealers of Henderson the same expense.* (Answer to questions made by the Traffic Manager, C. B. Compton, in his deposition.)

We submit, however, that neither the Louisville & Nashville R. R. Co., nor any other railroad company, possesses the right of erecting its favored customers or industries, and extending them service not extended others. It is its province to pursue the even tenor of its way, performing the same service for all alike,—recognizing neither friend nor foe, and having in each community, the full, perfect and complete right to use its own resources and natural advantages.

Recognizing the principle, the sovereign power of the State has said by Section 213, that it is not only the duty of a railroad company to put all freight of the same class, between the same points, on the same basis, but by section 214, the people have said, that it is the carrier's duty to receive all freight and transport the same with equal promptness and dispatch, and without any discrimination in favor of any person as to payment, transportation, handling or delivery; and by Section 214 they have said, that no such carrier shall make any preferential arrangement for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier.

It is further in evidence that the L. & N. R. R. company performs, and has repeatedly performed, the same service for R. A. Powell, and has repeatedly transported coal from his yard to the industries named. The railroad company claims it only did this when the coal had been delivered to his yard from some outside point. Now, this additional charge for switching is not a part of the transportation charge. Powell orders a car of coal from the St. Bernard Co. at Earlington. Instead of delivering it at its depot, the railroad company delivers it at Powell's yard by means of the switch connection with the plaintiff in error's road. This completes the transportation and delivery, and for this service the railroad is paid its regular rate. The railroad company has been paid its rate; Powell has gotten his coal when the railroad agreed to deliver it, and he may do what he pleases with it. He pleases to sell to the city mills, but instead of delivering it by wagon, an expensive method, he orders the railroad company to switch it to the city mills; the railroad company does it, receiving right to the location. Here, and charges for this service two (2.00) dollars per car. The evidence shows this was done regularly, and whenever R. A. Powell called for the service. Higdon, at the same time, may have had a thousand tons of coal at the Keystone Mine, waiting to be delivered at the same City Mill, with a shorter haul. The railroad company says, when called on by Higdon, we only perform switching between industries as an accommodation; we cannot be expected to compete with wagon deliveries,—haul your coal and deliver it by wagon. It forgets, seemingly, that it has accommodated Powell, when Powell had the same chance to deliver his coal by wagon that Higdon had.

To this it is answered, that the railroad company did not have to switch an empty car to Powell's yard to be loaded, but only had to switch from his yard a car already loaded. Very well,—we ask the railroad company,—what does Powell pay you for that service? It answers,—two ($200) dollars per car. What is that for? For sending our engine to Powell's yard, hitching on to the car, transporting it to the City Mill, and leaving it there the usual time to be unloaded, and then bring back the empty. For that he pays two ($200) dollars per car. Is that a reasonable charge for that service? Yes, that is what it charges every one. Doesn't it take more time, and require a greater expenditure of fuel to do that service than it would to take an empty coal car to the Keystone Mining & Manufacturing Company, and have it there to be loaded with coal? We say, then, though you make more out of it, we will pay you two ($200) dollars to take an empty coal car to the Keystone Mine to be left there, and loaded with coal—then we will pay you two ($200) dollars, the same amount Powell does, to take that same car to the City Mills, or to Wolfe & Co.,—or to the Pennsylvania Elevator, and leave it there the usual time to be unloaded, making a total charge of four ($400) dollars. If you can not do it for that, then fix what would be a reasonable charge. To this proposition we are again met with the same answer, that the railroad will only do this as an accommodation, and, while they are willing to accommodate one shipper and one or more industries, they are unwilling to accommodate all. They attempt to reserve to themselves the right of saying whose business they will build up, and whose destroy.

Has this Court, up to this time, from the statement and argument thus far made, grasped the full significance and effect of the railroad's attitude? We ask the Court to bear in mind, that the railroad company refused to furnish cars and perform this service at the rate charged other shippers of other commodities. It went further than that, and refused to fix a reasonable rate for the service. And still it went further and refused to perform the service at all at any price. There is an abundant supply of high-grade steam coal at our very doors, being mined by a company inside our corporate limits, connected by switch with the railroad tracks, fully equipped to furnish coal in car load lots, to all persons and industries connected with the railroad, yet every time one of these industries wants a car load of steam coal, it must be brought from Sebree, twenty miles away, or some point beyond that. The Keystone Mining & Manufacturing Co. may ship all the coal it wants to for consumption outside of Henderson, and the railroad company for this purpose will furnish all the cars and do all the switching desired of it, but when the Mining Company wants to deliver a car of coal to local consumers in Henderson, it is met with a flat refusal to furnish the car or to do the necessary switching at any price.

Our constitution does not stop with these provisions only, but, in addition, there is Section 196, as follows:

> "Transportation of freight and passengers by railroad, steamboat or other common carrier, shall be so regulated, by general law, as to prevent unjust discrimination."

Thus the people not only define some of the unjust discriminations which they were then personally cognizant of, but they

delegates to the General Assembly the right to prohibit and stop other unjust discriminations which might thereafter arise. Pursuant to this authorization, the General Assembly has passed general laws on the subject, and we call especial attention to Section 818, which, among other things, provides:

> "It shall be unlawful for any corporation * * * to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."

It should be unnecessary to argue, that it does subject coal dealers to a disadvantage for the railroad company to furnish cars and switch the same, when loaded, from one industry to another, for one kind or character of commodity, and not in regard to coal. And that to furnish cars and switch same between industries for one description of traffic, and not for another, necessarily subjects that other description of traffic to undue prejudice, and unreasonable disadvantage. Nor can there be any doubt, that when the railroad company switches the coal of the St. Bernard Mining Co. for R. A. Powell, Agent, or for any other foreign operator, and refuse to perform that service for a mine located in Henderson, it necessarily subjects Henderson operators to an undue and unreasonable prejudice and disadvantage.

A bountiful Providence has bestowed upon the inhabitants of the city of Henderson a rich supply of fuel. This is a natural advantage which the people of the community have the right to enjoy. No common carrier has the right, by the imposition of prohibitive freight rates, to tax the people of a given locality so as to deprive that locality of its natural advantages, or the

use of its natural resources. Especially has it no right to deliver to the people of the naturally favored locality, the output of other localities, and refuse to deliver to her own people in the same way, her own output. Yet that is exactly what the Plaintiff in Error has done, and is doing, in this instance.

The railroad company, by the deposition of its Traffic Manager, Compton, attempts to justify its action in this case by saying that the service to the grain dealers, and manufacturers of products, to the non-resident coal operators, and other industries for whom it furnishes cars and switches same between industries in the Henderson Terminals, is done as an incident to transportation on either incoming or outgoing freight. Then, by a very specious but fallacious argument, he likens this discriminatory operation to the "milling in transit" arrangements, and attempts to parallel that arrangement here. We want the Court to thoroughly understand and appreciate this position, and we therefore discuss it at some length. The milling in transit arrangement has been repeatedly upheld, and if the operation here was at all analagous, it would be justified. But it is not. To see this it is necessary to know what the milling in transit arrangement is. This is given in the evidence, but a practical illustration of it will make it clear.

Say the Henderson Elevator Co. had grain at points in southern Indiana; they wished to ship part of it to New Orleans, stopping it at Henderson to be handled and cleaned. The through rate from these points in Southern Indiana to New Orleans was one figure; the sum of the local rates from these points to Henderson, and then from Henderson to New Orleans, was a

higher figure. By the milling in transit arrangement, the elevator company was permitted to ship its grain from Southern Indiana points to Henderson, pay the local rate to Henderson and within one hundred and twenty days thereafter, it was given the right to ship the same quantity in bulk to New Orleans, upon paying the difference between the local rate it had paid, and the through rate. In this manner getting the benefit of the through rate to New Orleans, but getting at the same time, in theory at least, the privilege of handling, storing and cleaning the grain at its elevator in Henderson.

The same rule is applied to a shipment of grain to be manufactured in flour, the same quantity in bulk of flour to be shipped out within a given time. It is also sometimes applied, though under a different name, to a shipment of logs, to be manufactured into lumber, and then shipped out within a given time.

Now let us analyze this rule or arrangement and see what its essential features are, applying these essential features to the arrangement here attempted, and see the difference.

1st. The milling in transit arrangement is based upon through and local rates, simply by giving to two local shipments the benefit of one through rate. In this case there is no such basis. The four ($4.00) dollars per car here paid is not a part of a through rate, and has nothing to do with the transportation charge. If the grain is shipped from elevator to mill, the rate of four ($4.00) dollars is paid. If shipped from the Elevator out, the rate is the same on that shipment out, as if the grain had been placed in the elevator by wagon. The charge of four ($4.00) dollars per car is a charge for the service of furnishing

a car and switching it from one industry to another, an independent charge, and an independent service, and has no effect on the rate if, and when, the grain is shipped out.

2nd. The milling in transit arrangement only applies if and when, the grain is shipped out, and then only to the extent of the same quantity in bulk. Here the four ($4.00) dollars per car is paid ,regardless of where the grain may have come from originally, or what its ultimate destination may be. A. Waller & Co., may fill its elevator to overflowing from the wagon of the farmer, and ask the railroad company to furnish cars to switch and deliver it to the City Mills, and the cars are furnished, and no questions asked; when delivered to the City Mills, that concern may manufacture it into flour and deliver every pound of flour to the city consumers by wagon, and still no question is asked. The railroad company has been paid an independent price for its independent service, and they are quits.

3rd. Not only must the same quantity in bulk be shipped out, but it must be shipped in a given time. Here time has nothing to do with the matter. The product may be shipped out the next day, or the next year, or it may never be shipped at all, the charge of four ($4.00) dollars per car is ever the same, and has to be paid,—a separate and distinct charge for a separate and distinct service.

4th. Under the milling in transit arrangement, a through rate is established, say of 13 cents per hundred pounds, from the points in Indiana to New Orleans. The local rate from points in Indiana to Henderson is say seven cents; and the local rate from Henderson to New Orleans is, say, ten cents. These rates

may, or may not, apply to all classes of freight, but say they do. A grain dealer wants to ship grain to Henderson at the local rate, and the railroad company furnishes the car and transports it. Now suppose a coal operator should present to the railroad company a demand for a car to ship coal to Henderson, and is willing to pay and offers to pay the same local rates, or any other reasonable local rate to Henderson,—would the fact that under the milling in transit arrangement, the grain dealer may thereafter ship his grain from Henderson to New Orleans, on the basis of a through rate, justify the railroad company in refusing to furnish cars and transport the operator's coal to Henderson on the basis of the local rate? The question answers itself. Yet that is the result of railroad company's position here, if it should be sustained.

It is not here a question of the imposition of a higher or a lower rate;—but a question of the legal right of the railroad company to refuse to perform the service at all.

Not only is there abundant statutory and constitutional law imposing the duty upon the railroad company to perform the service in question, but, independent of such, the common law imposes such duty. In the case of Louisville & Nashville Railroad Company vs. Garrett, &c., 231 U. S. 7, this Court said:

> "The right of the carrier to make its own intrastate rates is subject to the law of the State, constitutionally enacted. In the absence of a legislative rate, it is the province of the courts in deciding cases that arise between shippers and carrier to pass upon the reasonableness of the compensation which the carrier has demanded for its services. In so doing the Courts apply the common law."

In support of our position, there are quite a number of de-

cisions construing and applying similar provisions, as well as the common law.

In the case of Bedford Bowling Green Stone Co., &c., vs. Oman, etc., 115 Ky., 369, the Court held that a switch leading from the railroad company's track to the Bedford Bowling Green Stone Company's plant, controlled by the railroad company, and over which it operated engines and freight cars,—was a part of the general system of the railroad company, and that it could not lawfully refuse to receive and transport freight belonging to Appellees, who owned and operated another quarry located thereon.

In the case of Louisville & Nashville Railroad Company vs. Pittsburg & K. Coal Co., 111 Ky., 960, it was held that the railroad company had no legal right to refuse to supply cars to a coal dealers along a switch in the city of Newport, where it furnished cars to various factories and other industries along the line of the same switch.

The case of Straight Creek Coal Mining Co. vs. Straight Creek Coal & Coke Co., 135 Ky., 536, involved the rights of a coal company operating a switch connecting with a railroad track. The Court held that under the facts of that case, the coal company was not a common carrier, but was at the same time controlled by the general railroad laws with reference to freight and charges. While the case involved the question of rates, rather than the question of service, and applies more particularly to the next branch of our argument, yet the following paragraph of the opinion, delivered by Judge Lassing, at page 545, is pertinent to this branch:

"This Appellee, while not a common carrier, is regulated by the general laws concerning railroads, in so far as they are applicable, and therefore the Appellee cannot prevent persons along its line from using its switch upon the payment of a proper charge; nor can it make this charge so great as to be either prohibitive or extortionate.'

The Constitutional and Statutory provisions in question are in line with, and possibly extend to some extent the common law, all of which are in line with the modern trend of thought and purpose, to secure equality and prevent discrimination. An illuminating authority upon the application of the common law is the case of McDuffe vs. Portland & R. R., 52 N. H., 430; 13 Am. Rep. 72. While the principle is old, and has been stated in cases before and since, it is so well stated there, that we quote the following:

"A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. * * * He is under a legal obligation; others have a corresponding legal right. His duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right."

"A common carrier of freight cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another. He may be a common carrier of one kind of property, and not of another; but as to goods of which he is a common carrier, he cannot discriminate unreasonably against any individual in the performance of the public duty which he assumed when he engaged in the occupation of carrying for all. His service would not be public, if, out of the persons and things in his line of business, he could select whom and what he would carry. Such a power of arbitrary selection would destroy the public character of his employment, and the rights which the public acquired when he volunteered in the public service of common carrier transportation. With such power, he

would be a carrier,—a special private carrier, but not a common public one. From the public service,—which he entered of his own accord,—he may retire, ceasing to be a common carrier, * * *; but, as long as he remains in the service, he must perform the duties apertaining to it. * * *

* * * As no one can infringe the common right of travel and commercial intercourse over a public highway, on land or water, by making the way absolutely impassable, or rendering its passage unreasonably unpleasant, unhealthy, or unprofitable, so a common carrier cannot infringe the common right of common carriage, either by unreasonably refusing to carry one or all, for one or for all, or by imposing unreasonably unequal terms, facilities or accommodation, which would practically amount to an embargo upon the travel or traffic of some disfavored individual. * * * Whether the denial is general by refusing to carry one person or his goods; whether it is direct by expressly refusing to carry, or indirect by imposing such unreasonable terms, facilities or accommodations as render carriage undesirable; * * * the right denied is one and the same common right, which would not be a right if it could be rightly denied, and would not be common, in the legal sense, if it could be legally subjected to unreasonable discrimination, and parceled out among men in unreasonably superior and inferior grades, at the behest of the servant from whom the service is due."

There is much more in the case cited which might be here quoted, but we have given too much space to it as it is. Our only apology is that these passages, and others which might be quoted, so forcibly express the general principles of the common law, that they justify the space given them.

Colorado has constitutional and statutory provisions similar to our own. The construction and application of these provisions was before the United States Supreme Court in Union Pacific R. R. Co. vs. Goodridge, 149 U. S., 681. The Court said that under the Interstate Commerce Act, under the Colorado

Statutes, and under all other similar provisions, it was the intention "to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality." In the syllabus, the rule is thus stated:

> "It is no proper business of a common carrier to foster particular enterprises, it is bound to deal fairly with the public, to extend to them reasonable facilities for the transportation of their persons and property, and to put all of its patrons upon an absolute equality."

The end sought to be attained, and the object in view in the adoption of our constitutional and statutory provisions, were the same as those Congress sought to reach in the passage of the Interstate Commerce Act. In the case of Interstate Stock Yards Co. vs. Indianapolis Union R. R. Co., 99 Fed. 472, District Judge Baker, held that switch connections with a railroad, implies the right of the owner thereof to service thereat by the carrier with which such switches connect, and that a common carrier "cannot lawfully deny switch connections or service to one person, place, locality or kind of traffic, which it affords to others similarly situated." and that it could not, therefore, limit its carriage to dead freight and receive and switch such, and refuse to receive and smitch live stock.

In the case of Barden and Swarthout vs. LeHigh Valley R. R. Co., 12 I. C. C. R. 194, the Interstate Commerce Commission made the following ruling:

> "The Commission does not think that a carrier can reserve to itself, or exercise the right to determine as to what commodities shall or shall not be moved over a switch connection, and dealt in by a dealer who is located upon a siding which is connected with carrier's line by such switch, except in so far as is necessary and

> proper to afford protection to life and property against the handling or storage of dangerous commodities, such as explosives or highly inflammable liquids."

There is no question raised in this case that furnishing the service in question would endanger life, or that the commodity in question is dangerous to handle or store, or is of an explosive or inflammable nature. Neither is there raised any question as to the railroad company's ability to furnish cars and perform the service, or that it would interfere in any way with its other business in the Henderson Terminals.

The case of the Grand Trûnk R. R. Co. vs. Michigan R. R. Commission 231 U. S. 457 is a strong case for Defendant in Error's contention, in that the Court there held that "railway companies cannot assert, as against the power of the State to compel the interchange of traffic within the corporate limits of a City, that they were not incorporated for intra-city transportation,"—and while it is true that was an exceptional case, the case at bar is even stronger in this,—The Grand Trunk case supra issued a tariff "canceling all inter-state rates between industries having private sidings on the system, and all rates between junction points with other carriers," while in the case at bar the regularly published tariff of Plaintiff in Error fixed the service at four dollars per car, and the service was performed for some favored few but not for all, the service performed being purely intra-state business. Nor does the 22 miles of track have a more important function as respects the commerce of the 500,000 people of Detroit, than does the three miles of track and its sidings have, as respects the commerce of the 16,000 people of the City of Henderson.

The decision of this court in the case of Louisville & Nashville R. R. Co. vs. Central Stock Yards Co. (212 U. S. 138) does not militate against our contention here.

That case was reversed because:

1st. The former judgment in a case between the same parties was *res adjudicata,* in so far as shipments from points outside of Kentucky were concerned, and even if it were not, then the Court intimates it would have held this section of the State Constitution void as a regulation of interstate commerce, in its application to interstate shipments.

2nd. The requirements that plaintiff in error should deliver its own cars to another road was void as an unlawful taking of property under the Fourteenth Amendment.

3rd. The requirement that competing roads should be given the use of the plaintiff in error's terminals, was an unlawful taking of property under the same provision.

This case does not involve shipments from outside the State of Kentucky, but only shipments originating and terminating inside the terminal limits of the City of Henderson, and therefore within the State of Kentucky. It does not contemplate that the railroad company should deliver its cars to another road, but only to use them on the tracks, sidings and switches owned by it or under its control, for the benefit of all alike. It does not contemplate that the railroad company should grant the use of its terminals to competing roads, but only that it shall receive and deliver the freight of all shippers on its own road alike. The rights of Higdon, or the duties of the railroad company in this case, if sustained as contended for, will not require the railroad

company to deliver its cars to any other road, or to grant to any other road the use of its own terminals. It will only require that the railroad shall furnish its own cars and perform the service on its own terminals alike to all shippers on its own line of road.

The case at bar comes within the rule of this Court in the case of Louisville & Nashville R. R. Co. vs. Kentucky, 183 U. S. 503, in which the contention that the State provisions operated as an interference with interstate commerce was presented and overruled because:

> "The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State."

See also:

> Minneapolis & St. L. R. Co. vs. Minnesota, 186 U. S., 257.
>
> Alabama & V. R. Co. vs. Mississippi R. Com., 203 U. S., 496.
>
> Northern P. R. Co. vs. North Dakota, 216 U. S., 579.

Shortly after the railroad company refused to perform the service in question, the Keystone Mining & Manufacturing Co., owner of the mine, instituted proceedings before the State Railroad Commission, to compel the defendant to furnish cars and perform the service in question. In due course a hearing was had before the Commission, and on the 30th day of November, 1909, the Commission handed down an opinion, which is here copied as follows:

"November 30, 1909.

Keystone Mining & Manufacturing Co.....Complainant.

Vs. Order.

Louisville & Nashville Railroad Co.....Respondent.

This case having been submitted to the Commission on the pleadings, evidence, exhibits, and arguments of counsel, and the Commission being advised, is of the opinion that the complainant is entitled to the following relief:

The defendant, Louisville & Nashville Railroad Company, should place coal cars on complainant's sidings at its mines, to be loaded with coal, and when loaded, take up and transport cars so loaded with coal, to the points of destination, and for such transportation may charge, collect and receive a just, reasonable, and non-discriminatory freight rate.

It is therefore ordered by the Commission that defendant, Louisville & Nashville Railroad Company, place coal cars on complainant's sidings at its mines, to be loaded with coal, and when so loaded, to take up said cars so loaded and transport the same to points of destination, at just, reasonable and non-discriminatory freight rates. (Signed)

A. T. SILER, Chairman;

L. P. TARLTON, Commissioner;

JOHN P. HASWELL, JR., Commissioner.

Attest:—D. B. CORNETT, Secretary."

We do not contend that this opinion is binding authority upon this Court, but it is entitled to great weight upon the question of the railroad company's legal duty to perform the service in question. It came too late to be of any service to Higdon in this case, as the year covered by his contract had expired four months previous to its rendition.

When we come to discuss the question of the rate which the railroad company should have charged, other authorities will be

cited, which have a material bearing, also, upon the point now under consideration, and to which we invite the attention of the Court upon the whole case. We are unable to perceive any ground upon which the railroad company can legally base its claim, that it was under no legal duty to furnish the cars, and switch the same from the Keystone Mine to the industrial plants named, at some price.

II.

The Plaintiff in Error established a flat rate of four ($4.00) dollars per car for this service, applicable to all shippers and commodities, and having performed the service for others, at that rate, Higdon was legally entitled to have the same rate applied to him.

We have, heretofore, and do now, grant the legal right of a common carrier to establish and charge one rate on one commodity, or class of freight, and a different rate on another class where the conditions are different. Different circumstances and conditions justify different rates. The railroad would unquestionably have had the right to establish a schedule, or tariff, of four ($4.00) dollars per car for grain shipments between industries in Henderson. If it cost more to furnish cars and switch same loaded with coal, then coal dealers could not have complained that they were charged a higher rate per car, provided the higher rate was a reasonable one, and applied alike to all similiarly situated. If it cost less to perform the service for coal dealers, the grain dealers could not complain if they were

charged a higher rate than the coal dealers, provided the rate charged them was a reasonable one, and applied alike to all grain dealers similarly situated.

If a tariff is adopted on a given class of freight, naming a certain rate between certain points, that tariff cannot be applied to one shipper of that class, and denied to another similarly situated. It must be applied to all alike, even though it may be an unprofitable rate for the carrier. If unprofitable, it may be increased to a profitable rate, but until changed it stands for the benefit of all. Not only does this apply to rates, but to additional or extra service. The rate must be the same to all similarly situated, and the service for which the rate is charged must be substantially the same to all. Special or extra service given to one must be given to all.

In the case of Alabama & Vicksburg Railway Co. vs. Railroad Commission of Mississippi, 203 U. S. 496, the United States Supreme Court, in an opinion delivered by Mr. Justice Brewer, said:

> "Even if a State may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist as against the power of the State, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the State to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments, by arrangements made with or to favor outside companies.

In Wight vs. United States, 167 U. S. 512, there were two shippers, one located on a railroad and one not. In order to

get the business away from its competitor, another railroad made arrangements with the shipper located on its rival's road, that if the shipper would have his freight shipped over its road, it would give him the same freight rate given others, and then haul the freight to the shipper's warehouse, free of charge. After they had done this for a while, it was ascertained that it cost the railroad 3 1-2 cents per 100 to make the wagon delivery, —the shipper offered to make his own delivery at that price, and his offer was accepted. Thereafter, the railroad company charged him full freight of fifteen (15) cents per 100 pounds, credited him with the 3 1-2 cents per hundred pounds for hauling, and collected the difference. The railroad charged another shipper, whose plant was not on a railroad at all, fifteen (15) cents per hundred pounds, but refused to allow him any rebate for hauling by wagon, claiming that such allowance was not necessary to get his business, as he would have to haul by which ever road he might ship. It was contended that the law only required equality of rates, and not equality of service; that it charged both the same rate, but performed a little additional service for one shipper over the other, which was not unlawful, but the Court held it was an unlawful discrimination under the Interstate Commerce Act, and upheld a judgment of conviction.

See also:

Augusta Brokerage Co. vs. Central of Georgia, E. Co., 62 S. E., 996.

A. W. Ass'n vs. I. C. R. R. Co., 7 I. C. R. 564.

Hilton Lumber Co. vs. Atlantic Coast Line R. R. Co., 6 L. R. A. (N. S.) 225.

We take it for granted that there will be no controversy in regard to the proposition that an established rate for a given

class applies to all within the class similarly situated. The controversy will doubtless arise in the application of the rule to this case, rather than about the rule itself.

With respect to service of the character shown by this record, within terminal limits in a place the size of Henderson, the railroad recognized the fact, that a car loaded with any class of freight, to be transported from one industry to another, would be under load a comparatively short while, and the cost of hauling a car load of one commodity would be substantially the same as the cost of handling another. Instead, therefore, of establishing one rate for grain and grain products, and another for coal, and another for lumber, and so on, the railroad established a flat rate of two dollars per car for transporting the car over its line from one industry to another, plus two ($2.00) dollars per car for the rental of the car, which rate applies to all classes of freight, and to all shippers, for whom the service may be rendered. It could have fixed a rate for each class; but this it did not do. It did fix a flat rate applicable to all. Let us see if this is not true? Let us go back to, and examine, the tariff provision found on page 130, Section 9, of the Terminal Tariff.

The provision says *that it does not* engage in the business of switching or transporting between warehouses or industries in the Henderson, Kentucky, terminals. Now, at the very time that statement was promulgated, viz., on the —— day of March 1908, and at the time that tariff went into effect, the railroad company was, and had been for years, engaged in the business of switching or transporting between warehouses and industries,

within these terminals. After it went into effect, it continued in that business without interruption up to the 1st day of July, 1908, throughout the year from then to July 1st, 1909, and it was still so engaged at the time the deposition of R. W. Powell was taken on the 7th day of May, 1910. The only change being, that while prior to March 20th, 1908, the rate was two dollars per car, after that date it became four dollars per car.

The only employees or officers of the railroad company who testify in the case are—R. W. Powell, the local agent, and C. B. Compton, its general traffic manager. R. W. Powell, in his first deposition, testifies to numerous occasions when it did engage in that service, and with his second deposition, files the statement of switching done, showing hundreds of cars, switched or transported between warehouses and industries in the Henderson terminals. He states that all of it was done under this 9th clause on page 130, and the rate there named was charged and collected. C. B. Compton says there was no other tariff governing this movement than the one in question, and the service mentioned was all rendered under this tariff.

The statement in this paragraph, that it does not engage in the business of switching between warehouses or industries, is not true. It is not true now, and it was not true when it was put there. If it had said it did not engage in the business of switching between warehouses and industries within the Henderson, Kentucky, Terminals, except for such warehouses or industries and for such freight as it might please to accept, then it would have been true. Such a provision in its tariff would have convicted it out of its own mouth. To impose upon the

ignorant, it puts one thing on its printed tariff, where it can be shown to all except the favored few, and then it proceeds with those few to do all the shipping between warehouses and industries they want done.

Whatever may have been its secret intention, the fact remains that in hundreds of instances, and whenever called upon, except in the single instance of shipments from the Keystone Mine, it did engage in the very business which this paragraph says it did not engage in. And in two instances it did engage in that business on shipments from that mine. We most emphatically say that the railroad company, from July 1st, 1908, to July 1st, 1909, was engaged in the business of switching or transporting freight between warehouses and industries in the Henderson, Kentucky, Terminals, and the evidence so shows. Therefore, the statement that it did not engage in that business must be eliminated from the case.

The words "as an accommodation" must also be eliminated because, First—They relate back to the false statement that it did not engage in the business. Second—They have become obsolete by the continued acts of the railroad company to the contrary. Third—The railroad is not engaged in the accommodation business, but in the business of a common carrier, and has no right to accommodate one unless it accommodates all.

This leaves in the provision the words, "where such service is performed, * * * a charge of two dollars per car, plus two dollars per car for car rental, shall be assessed." We have then, three facts: First—The Plaintiff in Error is a common carrier engaged in the transportation of all classes of freight,

including coal. Second—It is engaged in the business of switching or transporting at least some classes of freight for some shippers, between warehouses and industries similarly situated. Third—Where such service is performed, it has not only assessed by its tariff, but has actually collected, in hundreds of cases, a flat rate of two dollars per car, plus two dollars per car for car rental, or a total of four ($4.00) dollars per car.

If we are correct in these three conclusions of fact, and we do not see how there can be any doubt about that, then the application of the law should be, and, we submit, is, a comparatively simple matter.

If a carrier fixes a reasonable rate on a given class of freight for transportation from one place to another, it must accept and transport all freight of that class offered at the rate fixed, without discrimination either in the matter of price or service. If, instead of establishing a different rate on different classes of freight, between those same points, it fixes and establishes a flat rate of so much per car on all classes of freight, in car load lots, then it is equally as much its duty to accept all freight offered it in car load lots by shippers having the same or equal shipping facilities between these two points, at the established rate. In this case all warehouses and industries in the Henderson Terminals are put under a blanket schedule, to which is applied a flat rate of four ($4.00) per car. The point of shipment is one of the industries or warehouses in the terminal limits; the point of destination is another warehouse or industry within the terminal limits; the rate fixed is four dollars per car. Call it a switching movement, a transportation movement, or

what you will, it is a matter of carriage by a common carrier from one place on its line of road to another place on its line of road, for which it has the right to charge and does charge.

The principle to be applied, and which we are asking to be applied here, is the same that has been applied in other cases, time and time again,—that the classification made by the railroad company itself, be applied to all within the class. Most of the cases deal with rates on a particular class; this is true because railroad rates are usually made upon the basis of a different rate for each class of freight, while here it is made upon the basis of a flat rate per car upon all classes. Most of the cases deal with rates between stations more or less distant from each other, while here the railroad company has seen fit to operate a "belt road," or terminal railroad, as a part of its system. The haul, instead of being ten miles, or a thousand miles, is from a half mile to a mile and a half or three miles. These are the only differences between this case and hundreds of others, and, while they may present new facts, they call for the application of old principles of the law, frequently applied.

It is a fact, well known to every member of the Court, that in large cities, Belt or Terminal railways are organized and operated. These railroads confine their operations to the city in which they are located, and its environs, transporting cars from the railroad to an industry in the city, and from one industry to another in the city. There is just such a Belt railroad or Terminal Railroad in Henderson. Instead of its being operated by a separate and distinct corporation, it is owned and operated by the Louisville and Nashville Railroad Company.

It is just as much a part of the general system of the railroad as is its road from Henderson to Madisonville, or Hopkinsville. The same law which governs and controls the railroad in the transportation of freight between Henderson and Madisonville, or any other point on its road in the State of Kentucky, governs and controls it in the transportation of freight between two warehouses or industries on its belt line or terminal road. It is just as much a common carrier on the one as on the other. When it fixes a rate of four ($4.00) dollars per car on all classes of freight between plants on its terminal road, and carries for one at that price, it is just as much its duty to carry at that price for all similarly located on its terminal road, as it would be its duty to carry for all at the same rate from Henderson to Madisonville, if it established a flat carload rate on all classes of freight between Henderson and Madisonville.

The following, from the opinion of the Court of Judge Lassing, in Straight Creek Coal Mining Co. vs. Straight Creek Coal & Coke Co., *supra*, is pertinent and along the same line.

> "It is not disputed by any of the parties to this record, that, if appellee is a common carrier, it may not discriminate in trackage charges between its patrons and that, if it allows any of its patrons to haul over its switches free, then it cannot charge trackage against any of its patrons."

Here the Plaintiff in Error is a common carrier, it does permit the use of its belt or terminal tracks by some of its patrons; it has established a flat rate per car for the service in question; it performs that service for some of them, and charges that rate. We therefore submit that Higdon was legally entitled to the service, at the rate of two ($2.00) dollars per car,

plus two ($2.00) dollars per car for car rental, a total of four ($4.00) dollars per car, or an average of ten cents per ton.

III.

We submit, not only that four ($4.00) dollars per car was the rate fixed by the railroad, but that the evidence shows it was a reasonable rate. It is the same rate charged other shippers in car load lots for the same service. For transporting a car loaded with coal from R. A. Powell's yard to any of the industries, it charges two ($2.00) dollars, including the rental of the car. The service here asked involves but little more time or expense; the additional time and expense was not nearly as great as the original service for Powell. If two ($2.00) dollars per car is a reasonable rate for Powell, a coal dealer, for the service performed for him, then certainly four ($4.00) dollars per car is a reasonable rate for the service here asked. In every other place where similar service is performed, the rate is fixed and established at from one and one-half ($1.50) dollars per car, to five ($5.00) dollars per car, and in no instance, even for large cities, is it in excess of five ($5.00) per car.

No witness for the railroad company claims that the service could not be profitably performed at that price. Their silence on the question is an admission that the rate of four ($4.00) dollars is a reasonable rate, as is also the fact that it has established that as the rate where it does perform the service in Henderson. Certainly the railroad would not of its own volition have fixed that as the rate it would charge when it did perform the service, if it had not been a reasonable rate for the service to be performed.

The railroad refused to furnish the cars or perform the service in question at all or at any price. As a result Higdon could deliver no coal from the Keystone Mine at all. He had contracts which he was bound to fill. If the cars had been furnished and the service performed at the established rate of four ($4.00) per car, he could not only have delivered the coal he had contracted, but a large quantity more. The evidence shows that four ($4.00) dollars per car would have been a rate of ten cents per ton. Now, if, instead of refusing to furnish the cars, the railroad company had stood by the offer made, but withdrawn, to perform the service at fifty cents per ton, and Higdon, in order to get the coal delivered, had paid that rate, then both at common law, and under statutory regulations, he would have been entitled to recover the difference between the rate actually paid, and the established rate, if a rate had been established; and this, whether the rate had been established by tariff provision, or by its dealings with others. If no rate had been established, then he would have been entitled to recover the difference between that rate and what would have been a reasonable rate for the service.

In the case of Louisville & Nashville Railroad Co. vs. Walker, 110 Ky., 965, Kentucky Court of Appeals said:

> "And when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal action. He whose money is taken from him illegally, is to that extent damaged. It is not necessary for Appellee to show anything more than that he was compelled to pay more than Appellant had the right to charge."

The railroad had the right to charge the legal rate, or a

reasonable rate, and the exaction of anything in excess of that could be recovered.

Instead of exacting and collecting this illegal rate, the railroad company refused to perform the service at all. The coal was actually sold for delivery to Higdon's customers at a profit of forty cents per ton over and above the cost to Higdon, and ten cents a ton for freight. It not only had that market value, but was actually sold at that price. If the railroad company had accepted the coal and transported it at a rate of fifty cents per ton, and the legal rate was ten cents per ton, then Higdon's loss would have been forty cents per ton. Instead of accepting it and demanding fifty cents per ton, the defendant refused to perform the service at all. His loss was exactly the same it would have been if he had been required to pay fifty cents per ton for the service. He might have stopped right there, and recovered his loss from the railroad, but for the fact that he had obligated himself to deliver coal to his customers, and had to do it, regardless of the action of the railroad company in refusing to transport this particular coal. On July 13th, 1908, Higdon wrote to the railroad company notifying it of his contract with the Keystone Mines, and his contracts with industries in Henderson, and the position he would be in unless the company performed the service, and further, that he would hold it responsible in damages for his loss. After this he had the right to have the coal transported by some other carrier if he could, and recover the difference in price paid. There was, however, no other means of transportation. The contract with the Keystone Mines was for coal "F. O. B. cars on the L. & N. track at the mines"; the con-

tracts with his customers were mostly for coal in car load lots, and there was no railroad connection except by means of the plaintiff's railroad. He could not get the coal from any other mine in the city, because the Keystone mine was the only one having railroad connection. He could and did get the coal outside of the terminal limits, thirty or forty miles away, at the same price agreed to be paid the Keystone Company, but he had to and did pay fifty cents per ton to have it transported. His loss was just exactly the same as if the railroad company had hauled the coal from the Keystone Mine, and charged him fifty cents per ton therefor.

The payment of this rate of fifty cents a ton was rendered necessary by the refusal of the railroad to perform its legal duty as a common carrier. If it was the railroad's duty to perform that service at a rate of four ($4.00) dollars per car, or ten (10) cents per ton, then Higdon's damage amounts to forty (40) cents per ton on all the coal sold and delivered by him.

We submit that from the record it was the legal duty of Plaintiff in Error to furnish cars to the Defendant in Error at the rate of four dollars per car and the judgment of the lower Court should be affirmed with damages.

Respectfully submitted,

JAS. W. CLAY,

Counsel for Defendant in Error.

J. F. CLAY,

A. Y. CLAY,

Of Counsel.

Supreme Court, U. S.
FILED
MAR 30 1914
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 322.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

versus

JOE HIGDON, Doing Business Under the Name of Crescent Coal Company, Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Reply Brief for Plaintiff in Error.

BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

YEAMAN & YEAMAN,
EDWARD S. JOUETT,
WM. A. COLSTON,
HENRY L. STONE,
Of Counsel.

WESTERFIELD-BOWTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 322.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - *Plaintiff in Error,*

versus

JOE HIGDON, DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY, - - - - - - - - - *Defendant in Error.*

In Error to the Court of Appeals of the State of Kentucky.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

In our original brief in this case we presented to this court the salient evidential features of the case, in order that the court might pass upon the grounds upon which we rely for a reversal of the judgment of the State court. We did not go into the evidence in full, as we did not regard the details of same material to the questions presented for decision by the court.

In the brief for defendant in error there is a lengthy discussion of what purports to be the facts in the case. In view of that discussion, we desire to draw the court's attention to some of the inaccuracies therein.

It is stated on page four of said brief that "all coal consumers, with whom Higdon made contracts for their year's supply of coal, were likewise prepared to receive the coal delivered to them in carload lots." It appears, from the testimony of defendant in error, that he had contracts with only four industries in Henderson having spur connections at their plants, and to which he could deliver coal in carload lots. (R., 230.)

On page five of said brief, reference is made to the handling of two cars of coal from the Keystone mine to industries in Henderson, on March 4, and April 15, respectively; and it is stated that Higdon "knew of this service by the railroad company, before signing the contract with the Keystone Mining & Manufacturing Company." The inference to be drawn from this is that Higdon was led to believe, from the performance of the service on the two occasions mentioned, that the plaintiff in error would regularly engage in hauling coal from said mine to industries at that station; also that, in making said contract, Higdon acted in good faith. Nothing is farther from the real facts in this case.

Agent Powell believed the cars in question had been loaded for shipment to points outside Henderson, and that the orders for them were canceled, and, in order to relieve the cars, he moved them to a local siding for unloading. It is true that the defendant in error denied that any such information was given Powell, but it is nevertheless true that the defendant in error knew that the plaintiff in error would not perform transportation service from said mine to local industries. When the

car was moved on March 4, 1908, for the Henderson Elevator Company, Bosserman, the manager of the Keystone mine, told Bullitt, the president of the Henderson Elevator Company, that the railroad company would not transport coal from said mine to local sidings. (R., 209.) Powell did perform the service, believing that the order for said car had been canceled. Within a day or two, however, he told Bullitt that the plaintiff in error would not engage in the service regularly, all of which was communicated to the defendant in error. (R., 212.) The owners of said mine, when the spur was constructed and the mine was opened, understood that the plaintiff in error would not haul coal from the mine to side tracks at Henderson, for consumption at the latter points. The service had never been performed. No one expected the service to be performed. The defendant in error did not go to the plaintiff in error's agent and inquire whether or not the service would be furnished. He claims to have requested the service on April 15 for the purpose of establishing a precedent by which plaintiff in error would be bound. (R., 33.) When asked why he did not inquire as to whether the service would be performed, he replied: "I don't know. It never occurred to me to do it" (R., 34.)

The record, instead of showing that the defendant in error was misled by the movement of the two cars and believed that the service would be performed, shows his lack of good faith, and that his contract with the Keystone Mining & Manufacturing Company was made with a view to instituting an action for damages later on.

That view is borne out by the fact that all his demands for said service were based upon the performance of it at the rate of $4 a car, and that during the time from July 13 to August 13, when the plaintiff in error's offer of a rate of fifty cents a ton was open to him, he declined to ship any coal at all, but continued to demand the rate of $4 a car. The offer was made by the local agent of the plaintiff in error, and when it came to the attention of the Traffic Manager it was withdrawn. It was an unauthorized offer. But notwithstanding that, it was open to the defendant in error for a month and he did not avail himself of it. If his contract with the Keystone Mining & Manufacturing Company was made in good faith, he could have shipped under said rate of fifty cents, for a month, and if the rate was not a lawful rate, could have recovered any illegal charge therein. (L. & N. R. R. Co. v. Walker, 110 Ky. 965.)

Instead of shipping under said rate, he claims that he bought coal from mines other than the Keystone Mining & Manufacturing Company, with which he had no contract, and paid a rate of fifty cents from those mines to Henderson, to supply his customers.

The record shows that he could have supplied his customers from the Keystone mine, by wagon, at a transportation cost of thirty or thirty-five cents a ton. And it also shows that one of his customers paid thirty-five cents more a ton when deliveries were made by wagon than when made in cars. Yet, defendant in error did not supply said customer, or any other industries with which he had contracts for coal, from the Keystone mine,

at a transportation cost of thirty or thirty-five cents a ton; but, if his claim is correct, he supplied them with coal purchased from mines outside of Henderson, at a transportation cost of fifty cents a ton. His excuse for not supplying his customers with the coal from the Keystone mine was that his contract with said mine was for coal f. o. b. cars at the mine, and that his contract with his customers was to deliver the coal in carload lots. We have shown that only four industries to which he sold coal had spur connections. The record shows that only one of these industries—Waller & Co., of which the defendant in error was an officer—contracted for the delivery of coal in carload lots. The Keystone mine could not have sold any of those industries under contract with the defendant in error. And it appears, from the evidence, that the Keystone mine was willing to sell coal to any one that it could. It is not suggested that the Keystone Mining & Manufacturing Company objected to delivering coal to the defendant in error, under the contract of May 14, in wagons at the mine, instead of in cars at the mine, nor that it objected to the defendant in error's supplying his customers in Henderson, to whom the Keystone mine could not possibly sell coal, by hauling in wagons the coal from the Keystone mine.

Defendant in error, in his brief, emphasizes the fact that coal shipped to R. A. Powell from points outside of Henderson was, after the same was delivered to Powell's yard, switched to other industries at Henderson, for a switching charge of $2 a car. (Brief, pp. 12, 22, 25 and 47.) This movement is explained in the testimony of

Agent Powell. (R., 102.) The plaintiff did not at any time switch cars that were loaded at Powell's yard. The cars switched from his yard to other industries had previously been received from the Louisville & Nashville Railroad Company, from off its line, and switched to Powell's yard. There had been no switching charge made on the cars, as there was no switching charge made on any car coming into Henderson over the line of the plaintiff in error and on which the plaintiff in error had received a transportation charge. After the cars were placed at Powell's yard, and before they were unloaded, they were switched to some other industry at Henderson. In doing this the plaintiff in error was performing a service that it would perform for any one. The service followed a transportation service. It was not the kind of service demanded by the defendant in error.

Again, it is stated on page fourteen of defendant in error's brief that "it is shown that if the railroad company had furnished the cars, the Keystone Mining & Manufacturing Co. was ready, willing and able to supply the coal." The statement may not be material, but it is inaccurate. It is disproved by the record in the case.

The contract of the defendant in error with the Keystone Mining & Manufacturing Company provided that if more than twenty-five per cent. of the tonnage ordered in any one month should be pea and slack, then the buyer should, at the seller's option, be required to take and receive the higher grades resulting in making such pea and slack from the mine run, and also that the seller should not be required to deliver, nor the buyer to re-

ceive, a greater quantity of all grades combined than 2,000 tons in any one month, nor a greater quantity than 20,000 tons during the year, unless by express consent of both parties made at the time.

Under this provision of the contract, the greatest amount of pea and slack coal that the defendant in error could have obtained from the Keystone mine during any month was 500 tons, and for the whole year, was 5,000 tons.

During the period from July 1, 1908, to May 15, 1909—at which latter date the Keystone mine closed down—the defendant in error sold 14,882 tons of coal. Of that amount 11,322 was steam coal—that is, pea and slack—and some mine run. Under his contract with the Keystone Mining & Manufacturing Company, he could not have required that company to furnish him more than 5,000 tons of pea and slack.

The testimony shows that about twenty-five per cent. of the coal taken from the mines in that territory is pea and slack.

During the period that the Keystone mine was in operation, from June, 1907, to the middle of May, 1909—nearly two years, there was taken from the mine only thirty thousand tons in all. (R., 141.) If that coal was of the same character as the coal from other mines in that territory—and the testimony shows that the pea and slack ran about the same—there was taken from the mine during the two years approximately 7,500 tons of pea and slack. It appears therefore, that there is no ground for the assertion that the Keystone Mining & Manufacturing Company was willing and able to furnish the defend-

ant in error 20,000 tons of coal for the year beginning July 1, 1908.

On page forty-seven of brief for defendant in error it is said that no witness for the railroad company claimed that the service could not be profitably performed at a rate of $4 a car. Witness Compton testified that the rate of fifty cents a ton on coal from Henderson Division mines to Henderson was a low rate, that is, that it was a reasonable rate, and that the expense of performing the transportation service from the Keystone mine to private sidings at Henderson would be in excess of the expense of moving coal from mines located on the main line of the Henderson Division of plaintiff in error's road, from which mines coal could be brought into Henderson on regularly scheduled freight trains. The reasons for the excessive cost are explained in his testimony. (R., 65.) It is alleged by the plaintiff in error, in its amended answer—which allegations are accepted as true by the Court of Appeals of Kentucky—that the rate of $4 a car for the service is less than the cost of the service.

The foregoing is submitted for the court's consideration, if it is deemed proper to consider the same, in connection with the questions presented for decision in the case.

Respectfully submitted,

BENJAMIN D. WARFIELD,
CHARLES H. MOORMAN,
Counsel for Plaintiff in Error.

YEAMAN & YEAMAN,
EDWARD S. JOUETT,
WM. A. COLSTON,
HENRY L. STONE,
Of Counsel.

LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* HIGDON, DOING BUSINESS UNDER THE NAME OF CRESCENT COAL COMPANY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 322. Submitted March 19, 1914.—Decided June 22, 1914.

Attempts to inject Federal questions into the record by filing amended pleadings after the case has been remanded by the appellate court come too late to lay the foundation for review by this court, *Mutual Life Insurance Co.* v. *Kirchoff*, 169 U. S. 103, except so far as the appellate court gives consideration to, and passes upon, such questions when the case again comes before it. *Miedreich* v. *Lauenstein*, 232 U. S. 236.

In this case *held*, that defendant had not been deprived of Federal rights because the state court had refused to allow him to file an amended pleading and relitigate a question already decided by setting up alleged violations of Federal rights.

The State has full authority over shipments purely intrastate, and an averment that a service required at one point as to intrastate shipments might be required at other points in regard to interstate shipments only avers an indirect effect upon interstate commerce; and a defendant carrier denied leave to file an amended pleading to that effect is not deprived of rights secured by the commerce clause of the Federal Constitution.

149 Kentucky, 321, affirmed.

THE facts, which involve the validity under the due process provision of the Fourteenth Amendment of the Constitution of the United States of a judgment of the state court for damages for refusal to transport coal between intrastate points, are stated in the opinion.

Mr. Benjamin D. Warfield, *Mr. Charles H. Moorman*, *Mr. Malcolm Yeaman*, *Mr. Edward S. Jouett*, *Mr. William A. Colston* and *Mr. Henry L. Stone* for plaintiff in error:

The judgment of the Court of Appeals deprives the plaintiff in error of the reasonable control of its property and facilities used in the conduct of its business in violation of the Fourteenth Amendment. Am. and Eng. Ency. 158; *C. & O. Ry. Co.* v. *Hall*, 136 Kentucky, 379; Constitution of Kentucky, §§ 214, 215; *Clark Co.* v. *Lake Shore R. R. Co.*, 11 I. C. C. 558; *Dixon* v. *Central R. R. of Georgia*, 35 S. E. Rep. 369; *Elkins* v. *Boston &c. R. R. Co.*, 28 N. H. 275; Elliott on Railroads, § 1466; *Grand Trunk Ry. Co.* v. *Michigan R. R. Comm.*, 231 U. S. 457; *Hoover* v. *Penna. R. R. Co.*, 156 Pa. St. 229; *Harp* v. *Choctaw*, 118 Fed. Rep. 169; Hutchinson on Carriers, §§ 59, 60, 144; *Int. Com. Comm.* v. *Balt. & Ohio R. R. Co.*, 145 U. S. 263; *Int. Com. Comm.* v. *Alabama Ry. Co.*, 69 Fed. Rep. 227; *Johnson* v. *Midland R. R. Co.*, 4 Exch. 367; *Kansas Pac. R. Co.* v. *Nichols*, 19 Kansas, 247; *Kentucky R. R. Commission* v. *L. & N. R. R. Co.*, 10 I. C. C. 173; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684; *Lake Shore &c. Ry.* v. *Ohio*, 173 U. S. 285; *Laurel Cotton Mills* v. *Gulf & S. I. R. Co.*, 37 So. Rep. 134; *Lee* v. *Burgess*, 9 Bush, 652; *L. & N. R. R. Co.* v. *Kentucky*, 105 Kentucky, 179; 108 Kentucky, 628; *L. & N. R. R. Co.* v. *Cent. Stock Yards*, 212 U. S. 132; *Miner* v. *New York &c. R. R. Co.*, 11 I. C. C. 422; Moore on Carriers, p. 98; *Orlade* v. *N. E. R. R. Co.*, 1 C. B. N. 454; *Pitlock* v. *Wells, Fargo & Co.*, 109 Mass. 452; *Pfister* v. *Cent. Pac. R. Co.*, 59 Am. Rep. 404; *Santa Fe &c. Ry. Co.* v. *Grant*, 108 Pac. Rep. 467; *Ellis* v. *Atlantic Coast Line*, 12 L. R. A. (N. S.) 506; *Tex. & Pac. Ry. Co.* v. *Int. Com. Comm.*, 162 U. S. 197; *Varble* v. *Bigley*, 14 Bush, 698; *Wilson Produce Co.* v. *Penna. R. R. Co.*, 14 I. C. C. 170; *Wisconsin R. R. Co.* v. *Jacobson*, 179 U. S. 287.

The judgment of the Court of Appeals in this case is contrary to the Fourteenth Amendment because it requires plaintiff in error to perform a service at a rate that does not afford reasonable compensation for such service.

Atlantic Coast Line v. *North Carolina Corp. Comm.*, 206 U. S. 1; *Attorney General* v. *Old Colony R. R. Co.*, 22 L. R. A. 112; *Chi., Mil. & St. P. Ry. Co.* v. *Minnesota*, 134 U. S. 418; *Dow* v. *Beidelman*, 125 U. S. 680; *Georgia R. R. Co.* v. *Smith*, 128 U. S. 179; *Lake Shore &c. Ry. Co.* v. *Smith*, 173 U. S. 684; *Minn. & St. L. R. R. Co.* v. *Minnesota*, 186 U. S. 257; *Mo. Pac. Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Railroad Commission Cases*, 116 U. S. 307; *Smyth* v. *Ames*, 169 U. S. 466.

The decision of the Court of Appeals and §§ 214 and 215 of the constitution of Kentucky as construed by the court in that decision impose an unreasonable burden upon the interstate commerce of plaintiff in error, and are therefore repugnant to the commerce clause of the Federal Constitution. *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Herndon* v. *Chicago &c. Ry. Co.*, 218 U. S. 135; *L. & N. R. R. Co.* v. *Eubank*, 184 U. S. 27; *McNeill* v. *Southern Ry. Co.*, 202 U. S. 543; *Mississippi R. R. Comm.* v. *Ill. Cent. R. R. Co.*, 203 U. S. 305; *St. Louis &c. Ry. Co.* v. *Arkansas*, 217 U. S. 136; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347.

Mr. James W. Clay, *Mr. J. F. Clay* and *Mr. A. Y. Clay* for defendant in error.

Mr. Justice Day delivered the opinion of the court.

The defendant in error, Joe Higdon, doing business under the name of the Crescent Coal Company, brought suit in the Henderson Circuit Court, of Kentucky, to recover damages for alleged loss because of the failure of the Railroad Company to furnish him with cars at the Keystone Mining & Manufacturing Company's mine at Henderson, Kentucky, with which to perform certain contracts which he had made and which he was prevented

from fulfilling by the refusal of the Railroad Company. While the action was originally brought at law it was transferred upon motion of the plaintiff in error to the equity docket. The decree of the Circuit Court dismissing the petition was reversed in the Court of Appeals of Kentucky, and the case was remanded for a new trial in conformity to the opinion of that court (143 Kentucky, 73). The case was again tried and a decree for Higdon for damages was affirmed by the Court of Appeals (149 Kentucky, 321), and the case was brought here on writ of error. A motion to dismiss the writ for want of jurisdiction was, on December 16, 1912, postponed to the hearing upon the merits.

From the facts found and apparent in the record it appears: Higdon, doing business as the Crescent Coal Company, was engaged in buying and selling coal in the City of Henderson, and the Railroad Company was a common carrier having its main line running in and through that city. It had a belt line and various spurs and tracks leading from its main and belt lines into industrial plants in Henderson. The Keystone Company was operating a coal mine in Henderson, which was connected with the main and belt lines of the plaintiff in error's road by a spur which the latter operated and controlled. Higdon contracted with the Keystone Company for 20,000 tons of coal to be delivered to him on the spur track, and afterwards contracted with various plants having spur connections to deliver coal in car-load lots at certain prices. Thereafter he applied to the Railroad Company to furnish him cars at the Keystone Company's mine and to transport coal in them to other spurs at Henderson, offering to pay therefor four dollars per car or at the rate of about ten cents a ton, which he contended was according to the published rates of the Railroad Company. It refused to furnish him cars except at the rate of fifty cents a ton, which Higdon declined, and

afterwards the Railroad Company informed him that it would not furnish cars at any price. This action was brought with the result which we have stated.

No Federal question was raised in the first trial or upon the first appeal to the Kentucky Court of Appeals. The alleged Federal questions are said to arise because of two amended answers which the defendant in error tendered and which the Circuit Court refused to permit it to file. In its first amended answer the plaintiff in error alleged that it had built side tracks and spurs from its main track to certain industries in Henderson for the delivery and receipt of freight to and from points beyond that city; that it had constructed such a spur to the mine of the Keystone Company, with the express understanding that the plaintiff in error would not transport coal for the Keystone Company or for anyone else between that spur and other spurs at Henderson, but that it should be used solely for traffic coming into and going out of Henderson; that it was not engaged and did not propose to engage in the business of transportation as a common carrier between industries at Henderson or any other station, or in transporting coal from the Keystone Company's mine to spur tracks at Henderson, and that while it performed a switching service, it did so only when it preceded or followed transportation beyond Henderson. It further alleged that the service requested by Higdon was a transportation service, which the Railroad Company declined to perform because it did not profess to and did not engage in that business, and that it was not its duty as a common carrier so to do or to furnish cars for such purpose. It also alleged that its tariffs did not fix a rate for the movement of coal from the mine of the Keystone Company to the spurs at Henderson, and that it did not offer by such tariffs to perform such service; and that there was no other demand for such service, and no other coal mine at Henderson. And it alleged that it was not its duty to

perform such service for four dollars per car or for any other sum, but that a rate of fifty cents a ton, which was the legal rate in effect for hauling coal from points near Henderson to that city and which was reasonable, would have been a reasonable charge for the service requested by Higdon, and that a smaller rate would not have been adequate compensation therefor, and concluded that to compel the Railroad Company to perform the service asked by Higdon at four dollars per car or for a rate less than fifty cents a ton would be to compel it to perform a service which under the law it was not its duty to perform and at less than cost thereof and for less than the service was worth, with the result of depriving the Railroad Company of its property without due process of law and denying it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In its second amended answer it set up, besides certain of the allegations in the first amended answer to the effect that it was not its duty to move freight between private spurs, that its facilities at Henderson for delivering and receiving freight were amply sufficient to accommodate the public; that it was engaged in interstate commerce, and that to require the defendant to perform the service asked by Higdon would impose upon it the duty of performing like services at other points on its line in Kentucky and would impose upon it unreasonable, unjustifiable and unwarrantable duties which it as a common carrier was not required to perform and would be a direct and unreasonable and unwarrantable interference with its interstate business and its duties as a carrier of interstate commerce, and would impose an unreasonable burden upon interstate commerce contrary to § 8 of Art. I, of the Constitution of the United States.

Had the Court of Appeals put its decision upon the ground that the duty of the Circuit Court was simply to

give effect to the judgment of the Court of Appeals by enforcing the rights of the parties upon the principles settled by it in its first decision and that the attempt to inject Federal questions into the record by amended pleadings after the case was remanded did not seasonably raise Federal questions reviewable by the Court of Appeals, the case would be ruled by *Union Mutual Life Ins. Co.* v. *Kirchoff*, 169 U. S. 103, in which this court held that such attempts to raise Federal questions came too late to lay the foundation for review here. See also *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U. S. 1; *Bonner* v. *Gorman*, 213 U. S. 86.

The Court of Appeals of Kentucky in the opinion delivered in the second case did affirm the principle of the binding character of its first decision, but as it gave consideration to the offered amended answers in their Federal aspect and ruled concerning them, we have concluded not to sustain the motion to dismiss, but to regard the Federal questions as so far passed upon by the Court of Appeals as to present a case reviewable here. *Miedreich* v. *Lauenstein*, 232 U. S. 236, 243.

Looking to the opinion of the Court of Appeals in the second case, as we may properly do, to determine the nature of its ruling concerning the offered amended answers, we find that it held that the first part of the first amended answer was simply an elaboration of the defense presented by the second paragraph of the original answer, and that on the former appeal it had held that those facts did not present a defense to the action and that the former opinion was the law of the case and further consideration of that matter was unnecessary. Coming then to consider the conclusion of the averment of the first amended answer that a rate of four dollars per car would be below the cost of the service and therefore confiscatory, it did not pass upon the effect of that charge if required of the Railroad Company against its will, but held that its rates as fixed

by its own tariffs, interpreted by its conduct, as held in the first opinion of the Court of Appeals, had made that rate applicable to the shipments requested by Higdon and that therefore the requirement of performing the service at four dollars per car was not imposed upon the plaintiff in error except because of its own tariff rate which it might itself change at any time, but which while it was in force should affect all shippers alike, including Higdon. A reference to the former opinion of the court shows that the question whether the published tariffs of the Railroad Company applied to such service as Higdon required was elaborately considered, and it was held that it did so apply, and that as the Railroad Company was performing that service for other shippers similarly situated, to avoid discrimination, which the Constitution and laws of Kentucky inhibited, it was required to give the same rate to Higdon. It therefore results that in the so-called denial of the Federal right set up in the first amended answer the court in effect held that the facts upon which it was based had been concluded by the former decision, which was the law of the case, and to permit the Railroad Company to relitigate these facts because the result reached was alleged to violate constitutional provisions would permit it to relitigate that which the court held had been settled against it by the first decision of the Court of Appeals in which no infraction of Federal right was duly set up as required to lay the foundation for review.

As to the matter set up in the second amended answer the court held that it made no defense within the interstate commerce clause of the Constitution of the United States, because all the court had done was to make a decision which required the carrier to obey the state constitution and laws which prevented discrimination as to purely intrastate shipments. We think the court was right in this conclusion. The State had full authority over shipments purely intrastate, and the facts set up in the

second amended answer that the requirement made at Henderson might be made at other points in the State and would result in an unnecessary and unreasonable burden upon interstate commerce, only avers an indirect effect upon such commerce of the exercise of a right clearly within the authority of the State; and being only of that indirect and consequential character it does not deprive the Railroad Company of rights secured by the commerce clause of the Constitution of the United States.

We conclude that the rulings made in the Court of Appeals of Kentucky concerning the first and second amended answers which were not permitted to be filed in the court of original jurisdiction did not deprive the Railroad Company of rights secured by the Federal Constitution.

Affirmed.